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REPORTS
OF
CASES
TRIED IN THE
JURY COURT,
AT EDINBURGH, AND ON THE CIRCUIT,

FROM THE
AUTUMN CIRCUIT IN 1818,
TO THE
SITTINGS AFTER THE NOVEMBER TERM 1821,
BOTH INCLUSIVE.

By JOSEPH MURRAY, Esq.
ADVOCATE.

VOL. II.

EDINBURGH:

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LORDS COMMISSIONERS

OF THE

JURY COURT,

DURING THE PERIOD OF THESE REPORTS.



The Right Honourable

WILLIAM ADAM, Lord Chief Commissioner.

DAVID MONYPENNY, Lord Pitmilley.

ADAM GILLIES, Lord Gillies.



MATHEW ROSS, *Dean of Faculty.*

ALEXANDER MACONOCHIE, *Lord Advocate.* Succeeded by

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CASES
TRIED IN
THE JURY COURT.

INVERNESS.

PRESENT,
LORD PITMILLY.

GRUBB & MATHESON v. MACKENZIE.

1818.
September 10.

AN action of damages for destroying stake-nets.

**Damages for
destroying
stake-nets.**

DEFENCE.—Stake-nets are illegal engines. Those taken down were calculated to ruin the fishing of the defender, and rendered the navigation of the river dangerous.

ISSUES.

“ 1st, Whether, in the night between the

A

GRUBB, &c.

7.

MACKENZIE.

}

“ 9th and 10th days of April, in the year
 “ 1816, or about that time, nets and ropes
 “ belonging to the pursuers, and which were
 “ placed by them, or by their order, on stakes
 “ belonging to them, for the purpose of catch-
 “ ing salmon and other fish, at Criech and
 “ Spinningdale, on the north coast of the Frith
 “ of Dornoch, and at Ardchronie, on the south
 “ side of said Frith, were destroyed and cut to
 “ pieces by the defender, or by persons acting
 “ under the orders of the defender, or secretly
 “ instigated by him, to the great loss and da-
 “ mage of the pursuers, by the injury done to
 “ their fishing apparatus, caused by the afore-
 “ said acts?”

The second and third issues were, Whether the nets at Ardchronie were again beat down, cut, spoiled, or destroyed, by the defender, on or about the 2d May 1816, and 6th July 1816? and the fourth, Whether those at Spinningdale were again cut and destroyed by him, on or about the 10th July 1816?

The damages were laid at L.5000.

Witnesses
 partly examin-
 ed, re-inclosed,
 and called
 again.

Mr Cockburn wished to confine the examination of the witnesses to the first issue; to have them re-inclosed, and called back to

prove the others; to which Mr Moncreiff objected.

GRUBB, &c.
v.
MACKENZIE.

LORD PITMILLY.—It is not the part of the Court to interfere in a matter of this sort. Parties ought to arrange matters so as to save the time of the Court and Jury.

Mr Cockburn will conduct his case in the way he thinks best; and if any objection is taken when a witness is called, the Court will then give its decision. In other cases, something very near what is now proposed has been done; and if it is for the purpose of bringing out the truth, the counsel for the defender, I am sure, will not object to it.

The witnesses were examined, in the manner proposed, and an officer was inclosed with them; and the objection was not taken when they were called back.

On the second issue, the answers to the condescendence, and some of the other proceedings in the Court of Session, were given in evidence, to prove that the defender admitted having cut down the Ardchronie net. One of the Jury requested to know whether they were to receive this as evidence.

Proceedings in the Court of Session, evidence of an admission in the cause.

GRUBB, &c.
v.
MACKENZIE.

LORD PITMILLY.—The proceedings referred to are admissible here, and they are sufficient evidence of the defender's admissions.

Not competent to prove amount of wages to fishermen, under an issue for damage to fishing apparatus.

After proving the value of the nets destroyed, Mr Cockburn wished to prove the sum paid as wages to the fishers; to which Mr Moncreiff objected.

Cockburn.—The issue is for the damage done to the “fishing apparatus.” The work of the men is part of the apparatus which we lost by the destruction of the nets. We do not attempt to prove the value of the fish, as that is excluded by the Court; but this is a direct, not a consequential loss. It is wages, not profit.

Moncreiff.—The Court ordered part of the issue to be delete, which excludes the proof now offered. The Court held the mode of fishing illegal, and would not allow any other loss to form part of the issue, than the damage done to the stakes, ropes, and nets.

LORD PITMILLY.—The pursuer claims two distinct species of damage:—1st, The

direct damage occasioned by the injury done to the apparatus : 2d, The loss he has sustained, by being deprived of the use of that apparatus in catching salmon.

GRUBB, &c.
v.
MACKENZIE.

The Court, after argument and deliberation, struck out the part of the issue applicable to the loss under the second claim ; and it appears to me, that by doing so, they intended to exclude all evidence as to any thing except the direct damage. If they had intended to allow proof of the amount of the wages, they might easily have sent an issue on the subject ; but they have not done so ; and I therefore think the question as to the wages of the fishers inadmissible.

Moncreiff, for the defender, contended, that the pursuer was not entitled to any damages, as he was merely interrupted in an illegal encroachment on the rights of others.

Stake-nets are illegal, and the defender was entitled to remove them, as an obstruction to the navigation of the river. His doing so was not a criminal act ; and this is not a prosecution at the instance of the public prosecutor. If the mode of fishing had been legal, the defender must have been liable for

GRUBB, &c.
v.
MACKENZIE.

all the damage, both direct and consequential ; but being illegal, he is not liable in either.

Maitland, in opening the case, and *Cockburn*, in reply, stated—The pursuer claims reparation for the damage done—for the loss of the fishing—and a solatium.—All that has been said of the illegality of the mode of fishing, is irrelevant. The only question is, whether the nets were destroyed, and what is the value of them? The second issue is admitted; and from the circumstances proved, there can be no doubt of the others. The defender alone had the interest to destroy the nets, and some of them must have been destroyed by persons in boats, and he alone had boats in the frith.

LORD PITMILLY.—It is now my duty to submit my observations on the evidence, and the case in general; and in doing so, I shall endeavour to state, 1st, The precise points on which you ought to deliberate, and those from which you ought to withdraw your attention as irrelevant. 2d, The evidence on one side and the other, leaving you to draw the inference.

Much has been said of the illegality of stake-net fishing, and that no damages could be given on account of the interruption of an illegal act.

GRUBB, &c.
v.
MACKENZIE.

We have nothing to do with this. The Court of Session, knowing all this, and the law on the subject, have sent these issues, to ascertain the amount of the damages; and it would be very extraordinary, if we made a return, stating that that Court was mistaken, and that, as the mode of fishing was illegal, no damage could follow from the act of the defender. I also perfectly agree with Mr Cockburn, that the titles of the parties are not here under discussion. It would not be fit to send such a question, and in this case it is not sent. The Court of Session either have decided this, or will decide it, if there be any question on the subject.

The questions then are, Whether the nets were cut? and What is the extent of the damage? And to ascertain these, it will be necessary to take the issues in their order, and refer generally to the evidence.

1st Issue.—The questions here are, Whether the nets were cut? To what extent? and Whether it was done by the defender? That they were cut, is proved by three witnesses;

GRUBB, &c.
v.
MACKENZIE.

but the material question remains, Whether it was done by the defender, or by his orders? The evidence of this is circumstantial, and must be weighed scrupulously. It is not sufficient to infer or suppose it was done by him : you must be satisfied that it was done by him, and by no other ; and I have no hesitation in saying, that I do not consider this issue to be made out ; but this is a question of fact, and I have no wish to usurp your province.

2d Issue.—This is in a very different situation from the first, and you must consider whether there is any reasonable ground to doubt, that on this occasion the act was done by orders from the defender ; you must also consider, that it was very differently done from the others ; and that in this case the orders were to cut the stakes, not the nets. An attempt was made to justify this act, on the ground that the nets obstructed the navigation of the river. I was rather surprised, that the defender should have stated this, and the injury to his fishing, as his motive for cutting the stakes. It certainly was a good reason for applying to the Sheriff or the Court of Session ; but, on that account, the worst reason for following the course he did. I therefore

tell you, in point of law, that this does not justify his conduct, and ought not to be taken into consideration.

GRUBB, &c.
v.
MACKENZIE.

3d Issue.—This was sworn to by only one witness, and was most properly given up by the pursuer.

4th Issue.—Three witnesses swear to this; and the circumstances (which Lord Pitmilley detailed) are a most proper subject for the consideration of a Jury.

By a decision already given, the damages are confined to the injury done to the nets; and damages ought not to be a punishment of the defender, but indemnity to the pursuer. The proof of the amount of the damages is very slight and unsatisfactory; and the pursuer was bound to have brought better evidence. The nets, however, are worth something, and damages must be given on the whole circumstances of the case.

Verdict for the pursuer on the 2d and 4th Issues—damages L.100. Find the 1st and 3d not proven.

Cockburn and Maitland for the Pursuer.

Moncreiff and Matheson for the Defender.

(Agents, *Joseph Gordon*, w. s. and *James Pedic*, w. s.)

GRUBB, &c.
v.
MACKENZIE.

Expences to
pursuer, de-
ducting ex-
pence of de-
fending issues
on which de-
fender was suc-
cessful.

Cockburn moved for expences, as L.100 damages had been given.

Moncreiff opposed, and went into a detail of the case; and stated that a reference had been offered, and that he had gained more than the pursuer.

LORD PITMILLY.—In this case there were four issues; the 1st and 3d were not proved; the 2d and 4th were, and L.100 damages given. In such a case, the rule is, that we are to give expences subject to modification; that is, if the defender can shew that he has been put to expence in defending against these two issues on which he succeeded, this sum ought to be deducted from the pursuer's account.

LORD CHIEF COMMISSIONER.—The same principle applies here as in the case of *Kirk and Guthrie*, 15th December 1817.—See vol. I. p. 280.


INVERNESS.

**PRESENT,
LORD PITMILLY.**

MACKENZIE v. ROSS.

AN action of molestation, declarator, and damages, on account of the defender having used a road through the property of the pursuer, and repeatedly pulled down a march-dike built across it.

1818.
September 11

 Damages
claimed for using a road.

DEFENCE.—A denial of having illegally broken down the march-dike, or used any road through the property, to which he had not a just right by his titles and immemorial possession.

ISSUES.

“ Whether the road leading through the
“ pursuer’s property from Taynauld to Ross-
“ hill-House, the property of the defender,
“ was first made by the defender’s father
“ breaking through the march-dike that se-

MACKENZIE**v.
Ross.**


“ parates the defender’s property from that
“ of the pursuer; and the pursuer having en-
“ deavoured to put a stop to the said en-
“ croachments, by rebuilding the march-dikes,
“ or otherwise, Whether the defender, by
“ himself, or others acting in his name, and
“ for his behoof, have broke down said dike
“ as often as it has been rebuilt, or at least
“ repeatedly, and continued the said encroach-
“ ment on the pursuer’s property, by using it
“ as a road, to the loss and damage of the said
“ pursuer? or,

“ Whether the said road has been used as
“ a public road from time immemorial?

“ Damages claimed by the pursuer in the
“ summons, L.2000.”

In this case an order was obtained for a view. The agents could not agree on the viewers; and in that event, 55. George III. c. 42, § 29, provides, that “ six or more
“ of the first twelve on the list of Ju-
“ rors returned by the Sheriff,” shall have the view. The subject in dispute being situate in the county of Ross, the Clerk named the first six on the list returned by the Sheriff of that county.

When the case was called on for trial, *Moncreiff*, for the pursuer, objected.—A party in general has a right to challenge the Jurymen peremptorily, and for cause. But in the case of a view, he is excluded from this privilege as to six of the Jury, by the 29th section of the Act. The agent for the pursuer objected to the three named for the defender; and therefore the duty devolved on the Clerk, who named these three, along with others, to have the view.

The provision is, that six out of the first twelve must be named. The list for Inverness was first in the hands of the Clerk, and also first in the list made out by him, and was first read in Court. There are some of the viewers to whom we do not object; and as there is a provision that the trial may proceed, though the whole named have not had a view; those who are objected to may be omitted, and their place supplied by ballot.

MACKENZIE

v.

Rosa.

Viewers to be taken from the county where the subject in dispute is situate.

Russel's Form of Pro. p. 40.

Cockburn, for the defender.—This is saying the case cannot be tried fairly, or even intelligibly.

No protest was taken against the nomination by the Clerk; on the contrary, the pursuer was named his own shower, to point

MACKENZIE

v.
ROSS.

out the subject in dispute, and the view proceeded. Notwithstanding this, he now does not move to delay the trial, but says the proceedings must be annulled, that he may enjoy the *imaginary* right of peremptory challenge.

There is no ground in law for this objection, as the Clerk is not directed to make a list; nor is there any provision in the statute as to how the counties are to be arranged. It is the principle of trial by a Jury, that the Jurors ought to be from the vicinage; and, indeed, there is no method by which gentlemen could be sent from Inverness-shire, for the purpose of taking a view in Ross-shire. The case is not provided for in the Act, of more than one Sheriff: it therefore was a matter of discretion with the Clerk, which county should be placed first. A view has been had; and if the viewers are rejected, we must move to delay the trial, as it cannot properly be tried without them. The safest way is to allow the trial to proceed, and this discussion can go on upon an application for a new trial; but if we are forced to a trial without the viewers, the whole expence may be incurred to no purpose.

Moncreiff.—It is admitted that this case is not provided for. It is six out of the first twelve, which shows there must be a list, consisting of at least twelve; and there are only eight from Ross. It is the universal practice, and seems sanctioned by the 20th section of the Act, to follow the example of the Justiciary Court, and to place first, the Jurymen of the county in which the circuit town is situated. The other party must show a positive rule, or the trial cannot proceed on this view. It is a fallacy to say the Sheriff cannot send the Jurors to another county: he may direct them to go, and there is no compulsitor whether the place is situate in his own, or another county. A fine is the only compulsitor to make them attend the Circuit; and there is no fine in the case of a view.

MACKENZIE

v.
Ross.

LORD PITMILLY.—There is no precedent to guide me, as this is the first case in which the agents have not been able to agree upon six out of the Jurymen. I impute no blame, but merely state the fact. In this situation the Jury Clerk was to exercise his discretion; and he has done what appeared to him fair and right.

I must consider, 1st, The enactment of the

MACKENZIE
v.
ROSS.

statute; and 2d, What appears necessary in the circumstances which have occurred.

The statute does not contemplate the precise case which has occurred: The 29th section proceeds, first on the supposition that parties would agree; but if they differ, then the enactment is, that six or more of the first twelve on the list of Jurors returned by the Sheriff, not Sheriffs, shall have the view. It contemplates only *one* return, and applies to the list made up by the Sheriff, not to one made by the Clerk. But there are returns by *four* Sheriffs, and the Clerk may arrange these as he chooses. The Clerk puts this question to himself, Shall I issue a precept to the Sheriff of Inverness which he cannot execute, and may therefore disobey? Shall I bring this Court into the situation of issuing a precept which is null? He thinks this improper, and therefore issues the precept to the Sheriff of Ross, who is bound to obey it, and the gentlemen are bound to attend. In doing so, I am of opinion the Clerk did right. Besides, when we are all met here—when so much expence has been incurred—when a view has been had, at which the pursuer was present, and acted as a shower—when a view is necessary from the nature of the case—and

when it would be so inconvenient to go through the whole of this again ; even if I doubted what might have been the proper course to follow, in the first instance, I would be of opinion that the trial ought to proceed.

MACKENZIE

**v.
ROSS.**

If there is any special objection to any of the viewers, of course it may be stated as a reason why he should not be on the Jury.

To this decision a Bill of Exception was tendered. And as one of the viewers had been appointed tutor to the defender, Mr Cockburn consented that he should not be put on the Jury.*

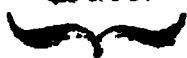
It was stated for the pursuer, that formerly there had been a question as to this road, with the father of the defender ; and after discussion, the depositions of some of the witnesses who were proved to be dead, were read.

Proof on Commission, in a cause against the father of the defender, relative to the same subject of dispute, received as evidence after the death of the witnesses.

Matheson opened the case, and stated the facts. He would prove that there was no road in the situation contended for, till the late Mr Ross made it in 1796, when he im-

* See *post*, pp. 20 & 28.

MACKENZIE

v.
ROSS.

properly shut up another road; till that time, no one had any interest that there should be a road where the defender wishes to establish one.

Cockburn, on the other hand, said he would prove there had always been a road in the direction contended for; and the Jury must take this positive, in opposition to the negative evidence which had been produced.

Moncreiff.—The defender has no right to this road by his titles, and must therefore prove immemorial possession. To this extent he is the pursuer, and bound to prove his case. He has only proved that some persons broke down the fence, or went over it, which is not uncommon, where there is no road.

LORD PITMILLY.—This is purely a question of fact, unmixed with law. But before stating the evidence, I may mention, that it will not be sufficient for the defender to prove, that he or others went clandestinely by this road. The question is, Whether the possession was clear and undoubted?

In the Court of Session, the averments were so opposite, that they sent this issue to

have the fact ascertained. The pursuer says, there was no road till it was made by Ross—that there was a march-dike across what is now the road—and that the dike was repeatedly rebuilt, when pulled down by the defender; and being the pursuer, he is bound to prove his averments. On the other hand, the defender says there was always a road here, and he must prove immemorial possession.

MACKENZIE

v.
ROSS.

There is much important proof on both sides, and the Jury must consider and come to a conclusion as to which is right. It is my duty to state the important points, and I shall do so without encroaching upon the province of the Jury, by even hinting an opinion. (His Lordship then read a considerable part of the evidence on each side.) The result of the evidence is, that the witnesses for the pursuer state that there was no track, and no slap. Those for the defender agree that there was a road and a slap.

A general finding for the pursuer or defender is sufficient; but it is quite competent to find specially the facts you consider proved.

“ Verdict for the defender.”

MACKENZIE

v.

Ross.*Moncreiff and Matheson for the Pursuer.**Cockburn and Maitland for the Defender.**(Agents, James Pedie, w. s. and Joseph Gordon, w. s.)*

Direction by a
Judge in a
matter preli-
minary to a
Trial, not a
subject for a
Bill of Excep-
tions.

14th June 1819.—A motion was made (in presence of the three Lords Commissioners), that Lord Pitmilley should be authorised to sign the Bill of Exception in the above case.

LORD CHIEF COMMISSIONER.—We must refuse this application, as it relates to a matter preliminary to a trial. If granted, it would be set aside in the House of Lords for irregularity, Bill of Exceptions not being the remedy for such a proceeding. It is like an objection to the notice or summons of a witness, which may occasion what is termed a mis-trial; the remedy for which is not a Bill of Exceptions, but an application for a new trial.

INVERNESS.

**PRESENT,
LORD PITMILLY.**

MACKENZIE v. ROSS.

1818.
September 12.

AN action of molestation, declarator, and damages, for having built a house on a muir, said by the pursuer to belong to him.

Damages
claimed for
building a hut
on the property
of the pursuer.

DEFENCE.—The house is not built on the pursuer's property; nor did the defender ever molest the pursuer in the possession of his property.

ISSUES.

“ Whether the defender, by himself, or
 “ his tenant Donald Munro M'Finlay, has,
 “ without the pursuer's consent, and to the
 “ loss and damage of the said pursuer, erected
 “ a house in the neighbourhood of the village
 “ of Tollie, upon a part of the Muir of Tol-
 “ lie formerly belonging in common proper-
 “ ty to the predecessors of the pursuer and

MACKENZIE

v.
ROSS.

“ defender in their respective lands, but
“ which, by a contract of division of said
“ muir, entered into betwixt the pursuer’s
“ grandfather and the defender’s predecessors
“ in the lands of Milncraig, in the year 1757,
“ became the exclusive property of the pur-
“ suer?

“ Whether the defender, by himself or his
“ foresaids, have committed other encroach-
“ ments on the parts of said muir, his the
“ pursuer’s exclusive property, as aforesaid,
“ by cutting and paring the surface thereof,
“ and carrying off the same for fuel, to the
“ loss and damage of said pursuer.

“ Damages claimed in the summons
“ L.2000.”

The muir of Tollie, which it was said had been possessed in common, was divided by a contract in 1757, in terms of which, the pursuer was to have 1600 yards, from the burn of Tollie westward, and the defender 1200, from the burn of Tomatten eastward. It was alleged that the defender had built a hut on the portion assigned to the pursuer, and the present was an action to ascertain the rights of the parties to the ground.

When the case was called on for trial;

the same objection was taken to the viewers as in the above case, and was again repelled.*

MACKENZIE

v.
ROSS.



The first witness for the defender was called to prove the state of possession.

Moncreiff.—There is nothing in the issue to warrant this. The deed in 1757 is regular and probative; and the Jury are merely to say, from the proof, whether this part was given by it to the pursuer. The Jury are not to set aside a regular mutual contract, by a proof of the state of possession. The Court have not power to send such an issue.

Proof of possession of a muir allowed, on an issue as to encroachments made on the part given to the pursuer's predecessor by contract.

Cockburn.—The pursuer only says that a contract did exist, and that parties acted upon it. If the question depended entirely on the contract, the Court would have called for it, and not have sent the case to a Jury; but they were aware that there might be other contracts, or that this might never have been acted upon.

LORD PITMILLY.—The averments by the pursuer are—

1. That this is part of the muir of Tollie.

* See *ante*, p. 17; & *post*, p. 28.

MACKENZIE

v.
ROSE.

2. That the muir was divided in 1757.

3. That a hut has been built by the defender, on the share allotted to him, the pursuer.

The defender neither admits nor denies the existence of the contract; and he might have added, that, if it did exist, it was departed from; and then there would probably have been an issue on the subject. But there is no question whether, if the contract exists, it is binding.

The hut is built so near the line of march, that, in my opinion, it is important to fix the possession, as an article of evidence, in a doubtful case, to shew the precise line allotted by the contract 1757. I admit this evidence, that I may know all that I can know as to this fact. Perhaps on hearing the whole I may change my opinion.

Moncreiff.—I must tender a Bill of Exception, to entitle me to question the verdict.

LORD PITMILLY.—I have taken a note, that I find it competent to examine the witness as to the possession of the muir since 1757.

Moncreiff, in opening the case contended, that the questions were, 1st, Whether the hut

was built? 2d, Whether it was on ground formerly common? 3d, Whether it fell under the division made by the contract? It is not competent to try the validity of the contract, or whether it is cut down by prescription.

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v.
ROSS.

Cockburn.—We admit having directed the building of the hut; and the only question is, Whether had we a right to do so? or Whether is it built on the property of the pursuer? The pursuer must prove that the hut is built on his exclusive property: he has not proved any thing as to the possession since 1757; and you must hold that the contract was never acted upon: we cannot prove that it was not acted upon; and it is a singular fact, that the defender did not know of the existence of the contract till eight days ago. It is proved to have been possessed in common subsequent to 1757; and at the place in question, there are not 1600 and 1200 yards, which are the measures stated in the contract.

Moncreiff.—There is no difficulty in this question. The whole pleading on the other side was to shew that the contract was done away with. His Lordship held, that this

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v.
ROSS.

evidence could not cut down the contract, but was admissible to shew on which property the hut was built. The hut is far within the part belonging to the pursuer. It is not enough for the defender to prove the hill common after the contract; he must claim it as his property.

LORD PITMILLY.—In the course of the proof, I had occasion to express my opinion of the nature of the issue, and the points you ought to keep in view. They are, whether before 1757 the muir of Tollie was common to Ardross and Milncraig? Whether this property was divided in 1757, by a contract? and Whether the hut was built on that part of it which ceased to be common, and was given to Ardross?

We are tied down to the issue, and are not entitled to wander into the summons and other proceedings. The defender says the contract is dead, and lost by prescription. This is a good allegation in the proper place, but not here. If you are satisfied that there was a contract in 1757, you must give effect to it, though you may think it was not acted upon.

That there was a common in the property,

is clearly proved. The extract also proves that there was a contract; and this is not to be done away by usage or prescription. The whole case, therefore, turns on the question, whether this part was given to Ardross.

MACKENZIE

v.
Ross.

It is near the march, and close on Milncraig; but it is difficult to say on which side. I am happy that there was a view, as it is a case most fit for it. The pursuer must make out his case, and prove that this hut is on his property. If he has left it doubtful, you must find for the defender.—(His Lordship then gave a summary of the evidence.)—If you find for the pursuer, it will be proper also to assess the damages, which, I suppose, will be the smallest coin. If he has not made out his case, then you will find for the defender.

“ Verdict for the defender.”

Moncreiff and Matheson for the Pursuer.

Cockburn and Maitland for the Defender.

(Agents, *James Pedie, w. s.* and *Joseph Gordon, w. s.*)

This case was tried on Saturday; and in order that part of the Jury might return

MACKENZIE**v.
ROSS.**

home, the counsel consented to ballot for the Jury to try another question between the same parties, set down for trial on Monday. The same Jurymen who had the view in the case above reported, had also been viewers in the case to be tried on Monday; and when the Court met on that day, Mr Moncreiff again tendered a Bill of Exceptions to the decision that the viewers were to form part of the Jury, and did not proceed to trial.

In both the cases reported above, applications were made for new trials, which were refused. Both were carried to the House of Lords by appeal, and both appeals dismissed.

**ABERDEEN.****PRESENT,****LORD PITMILLY.****1818.
September 26.****PETER v. TERROL.**

An apprentice
not bound to
work for his
master, except
in relation to
his trade.

SUSPENSION by an apprentice and his cautioner, of a charge by a master, to compel performance of the conditions of indenture.

ISSUES.

PETER
v.
TERROL.


“ Whether the suspender William Peter,
“ being bound apprentice to the charger, by
“ articles of indenture bearing date 12th
“ November 1814, and referred to in the bill
“ of suspension, did, in the month of February
“ 1817, desert the service of the said charger,
“ contrary to the conditions and stipulations
“ of said indenture; or whether, on said oc-
“ casion, the charger turned the suspender
“ out of his service, for refusing to perform
“ services which did not fall within the terms
“ of the indenture ?

“ Whether the suspender, since his dismis-
“ sal as aforesaid, has sundry times offered to
“ return to the charger’s service, and serve
“ out the remainder of his apprenticeship,
“ according to the conditions of his inden-
“ ture ?”

The parties differed as to the facts; the defender alleging that the pursuer left his service; the pursuer, on the other hand, stating that he was turned off by his master, on account of having refused to do menial services, not in the line of his trade; and that he had offered more than once to return and serve out

PETER
v.
TERROL.

his time, on condition that he was to be employed solely in his trade.

After the case was opened for the pursuer, Lord Pitmilly suggested, that before calling parole evidence, the indenture ought to be put in evidence.

Letters of
horning and
suspension re-
ceived as evi-
dence of the
terms of an in-
denture nar-
rated in them.

Gordon, for the pursuer.—The indenture is not here, but it is narrated in the horning and suspension.

LORD PITMILLY.—The indenture itself should have been here; but in the infancy of this institution, mistakes will occur; and as the *defender* founds on the indenture, and the case cannot be tried without knowing the terms of it, these documents may be held sufficient to shew the terms.

Parole evidence
of the contents
of a written do-
cument reject-
ed.

A witness for the defender was asked if he carried from the defender a letter, offering to submit the matter to arbitration?

LORD PITMILLY.—It is impossible to receive parole evidence of the contents of a written document.

(To the Jury.)—The issues in this case are so clear, as to require no explanation. The first

PETER
v.
TERROL.

depends on the nature and extent of the indenture. The indenture ought to have been here; but though it is not, we have evidence of the terms of it, in the diligence raised upon it. The important clause is that by which the master engaged to teach the pursuer his trade. The terms of it are clear, and by it the master and apprentice are only bound in relation to the trade. If the apprentice agrees to go out of his trade, well; but he is not bound to do so. If it had been alleged that there was a separate contract to the contrary, the party making the allegation would have been bound to prove it; but there is no such question here, and it is not proved. Some evidence was adduced as to the custom of the country, but no such question is here; the only question is on the indenture, which is the foundation of the contract; and I submit it to you, as a proposition in law, that when the terms of an obligation are clear, we are not entitled to explain them by custom.

The second issue is, Whether the pursuer offered to return to the saddlery business? The offer is proved by the letter and two witnesses; and at the time of the offer, there was an opportunity of explanation; but the master, instead of this, told him he might go

**PETER
v.
TERROL.**

about his business, unless he would do what he gave him to do.

If you are satisfied that he was turned off for refusing to do what he was not bound to do, and that he offered to return, then you may find for the suspenders.

“ Verdict for the suspenders on both
“ Issues.”

James Gordon, for the Pursuer.

Maidment, for the Defender.

(Agents, *J. R. Skinner*, w. s. and *James M'Cook*, w. s.)

ABERDEEN.

PRESENT,
LORD PITMILLY.

1818.
September 26.

FRAZER v. MAITLAND.

Buildings on a
farm found to
have been erected
by a tenant.

THIS case relates to the value of buildings erected on a farm.

ISSUES.

“ 1st, Whether the wings of the farm-house
“ of Gateside were erected at the expence of
“ the then landlord, Mr Leith, of Freefield?

“ 2d, Whether the offices on the said farm
“ were suitable to the said farm, in point of
“ size or extent ?”

FRAZER
v.
MAITLAND.



Mr Frazer, the landlord, failed to appear. Lord Pitmilley observed, that it would be necessary to prove the notice of trial; and that, as he wished rather to overdo than to omit any thing in so singular a situation, Mr Brown, Clerk of Court, was put on oath, and produced a letter from the pursuer's agent, stating that he did not mean to appear.

An affidavit was also produced, that the agent had got notice by proviso.

Four witnesses were then examined.

LORD PITMILLY.—As the pursuer has not appeared, the question is, whether the defender has proved his case. There is no law in the case. Much evidence could not be expected, as the buildings were erected 40 years ago; but one witness swore, that he was employed at the building; and another swore to his belief that the buildings were erected by the tenant. This is legal, and sufficient evidence in support of the direct testimony to a fact so remote.

FRAZER
v.
MAITLAND.

On the second Issue, there are two accurate and distinct witnesses.

“Verdict for the defender on both Issues.”

Gordon, for the Defender.

(Agents, *Arthur Campbell*, w. s. and *John Morrison*, w. s.)

ABERDEEN.

PRESENT,

LORD PITMILLY.

1818.
September 28.

FORBES v. TAYLOR.

A tenant found to be one year's rent in arrear, and that caution was not given.

SUSPENSION of a charge on a precept of ejection, founded on the Act of Sederunt 1756.

ISSUES.

“Whether, at the time the chargers
“brought a summons of removing against the
“suspender in February 1817, the suspender
“was due the chargers a full year's rent of

“ the farm of Quilquax, held by him from
“ them in lease ?

FORBES
v.
TAYLOR

“ Whether the suspender offered certain
“ persons as cautioners to the chargers, or
“ their agent ? and Whether the chargers, or
“ their agent, duly intimated to the suspend-
“ er, previous to the date of the decree of re-
“ moving, upon the 9th day of June 1817,
“ that they would not accept of the said per-
“ sons as cautioners ?

“ Whether, on or about the 2d day of
“ June 1817, the proposed cautioners declined
“ to become cautioners for the suspender, at
“ a communing at Schivas House, in presence
“ of the charger, Mr Forbes, and the sus-
“ pender himself ?”

This case was called on for trial on Mon-
day. On Saturday a minute had been given
in, consenting that the Jury, to try it, should
then be ballotted, in order that the other Ju-
rors might be relieved from their attendance.
On the day of trial, the Court waited for
some time, before either counsel or agent for
the defender appeared. At last the agent
was seen entering the Court ; and being
called on, stated that he had abandoned his

FORBES
v.
TAYLOR.



case. In these circumstances, Lord Pitmilley stated, that the agent ought to remain in Court, and be examined before the Jury.

The notice of trial was read from the record, and the minute consenting to the ballot for the Jury, put in evidence. The agent was then called and examined. He stated that he had been agent for the defender, but that he had given up the case three weeks ago; that he had seen the party last night, and explained to him that he would not defend it. Two witnesses were then examined on the facts of the case, and the defender called as a haver, to produce his receipts for rent.

LORD PITMILLY.—This is an unfortunate dispute between a landlord and tenant.

On the first Issue to prove the tenant in arrear, he is called to produce his receipts. These, he states, he put into the hands of a person who is not here to produce them. The second question is, whether he offered caution. A witness has proved that the bond of caution he offered, was conditional; and that the cautioner afterwards withdrew. The third is a sequel to the second; and the evidence

on it I consider sufficient. If you are of the same opinion, the simple way is to find for the pursuer on the three Issues.

FORREST
TAYLOR



“ Verdict for the pursuer.”

James Gordon, for the Pursuer.

(Agents, *P. Irvine, and F. McCook, w. s.*)

In reference to what had been said on a former day by one of the counsel, as to the hardship of subjecting a party to the great expence and trouble of a trial by Jury, in a case of only a few pounds value,

LORD PITMILLY, before dismissing the Jury, observed :—I have no doubt that this mode of trial will be found most beneficial; and I hope cases of small, as well as great importance, will come to be tried in this manner. Hitherto no difficulty has arisen from the Jury, who are the essential part of the institution. Any difficulties that have arisen, have been from the counsel and the Court.

Counsel, from their anxiety to do enough, have called witness after witness, and treated every case as if it was a *cause celebre*; but

FORBES
v.
TAYLOR.

when this mode of trial is better understood, I hope cases of small, as well as great importance, will be tried, and without great expence.

The Jury, the essential part of the institution, has always done its duty, by an honest, upright, and deliberate consideration of the questions brought before them.

PRESENT,
LORD PITMILLY.

1818.
November 24.

HAMILTON and OTHERS v. HARVEY and OTHERS.

Reduction on
the ground of
mental de-
rangement
and idiocy.

REDUCTION of the conveyance of an heritable property, on the ground of mental derangement and idiocy.

ISSUES.

“ 1st, Whether, in spring 1799, when the
“ trust-disposition in favour of Andrew Ait-
“ chison, the defenders’ author, was executed,
“ the late Captain Hamilton was in a state of

“insanity, and whether he continued in that
“situation until the time of his death ?

HAMILTON, &c.
v.
HARVEY, &c.

“2d, Whether, at the date of the alleged
“sale of the lands of Garthumlock, referred
“to in the process between the said Andrew
“Aitchison, as trustee for Captain Hamil-
“ton, and the late John Harvey, the said
“John Harvey was in the knowledge that
“the said Captain Hamilton was in a state
“of insanity ?

“3d, Whether, before the said transaction
“was concluded, or before the said John
“Harvey had made the alleged expenditure
“upon the property, as specified by the ac-
“counts in process, the said John Harvey was
“specially warned of the objection that lay
“against Aitchison’s title to sell the lands,
“and put upon his guard against concluding
“the sale, or paying the price, or commen-
“cing or continuing any operations on the
“property ?

“4th, Whether the sum of L.3125, the
“price paid for the lands by the defender, was
“a fair and adequate price at the date of the
“sale, and whether the said sale proceeded at
“the instance of heritable creditors ?”

The late Mr Hamilton was, for some time

HAMILTON, &c.

v.
HARVEY, &c.

before his death, in a state of mental derangement; and it was alleged, and ultimately found in a different action, that, while in this state, Mr Aitchison obtained his signature to a trust-deed, empowering him to sell Garthumlock. The heritable creditors, anxious to obtain payment, urged Mr Aitchison to sell, otherwise they would be under the necessity of forcing a sale, under the clause in their bond. He accordingly advertised the lands for a public sale; but the upset price was not offered, and he sold the land privately to Mr Harvey. This action, brought in 1810, by the son of Mr Hamilton, and Mr Bower, his curator, was for the purpose of setting aside that sale, on the ground that Mr Hamilton was, at the time of executing the trust-deed, in a state of "melancholy mental derangement and idiocy." The defenders admitted the fact, that Mr Hamilton had been insane, but pleaded that this could not affect their right, as Mr Harvey did not know it at the time of the sale, and made the purchase from Aitchison, who acted under a regular trust-deed.

Agency sustained as an objection to a witness.

The first witness called for the pursuers was Mr Bower, who was married to the aunt, and had been appointed by the Court, curator to young Hamilton.

Jeffrey, for the defenders.—It is impossible to receive him. He is a party in the action—he acted as agent ever since the case began—and is a relation within the degrees excluded from giving testimony.

HAMILTON, &c.

v.
HARVEY, &c.

Clerk, for the pursuer.—Mr Bower was curator to the pursuer at the time this action was brought, but his curatory lapsed three or four years ago, by the pursuer coming of age. Tutors and curators are good witnesses; and being nominally a party is no objection, which reduces this to the simple objection of agency. Agency, though at one time a good objection to a witness, is no longer so by the law of Scotland—*M'Latchie v. Brand*, 27th November 1771—*M.* 16,776; *M'Alpine v. M'Alpine*, 2d December 1806—*M. App. Witness*; *Reid v. Gardyne*, 10th July 1813. In *Richardson v. Newton*, 30th November 1815, the Court refused to allow the examination of one agent; but there must have been other objections, as in the same case the examination of another agent was allowed. In *Clark v. Thomson*, in the Jury Court, an agent was admitted to prove a hand-writing.

There is no ground in reason or principle for rejecting the evidence; and if it is to be

HAMILTON, &c. decided by authority, there are many judgments of the House of Lords, where the objection has been uniformly repelled, though undoubtedly the Court of Session have been most unwilling to adopt the principle.

^{v.}
HARVEY, &c.

Jeffrey.—I do not dispute that tutors and curators have been received; though nominally parties in the action; but this case combines with that character, the character of agent. It is admitted that the action was brought and conducted by the advice of this person; in fact, it is his own case; he pays the expence of conducting it, and has an interest. His wife is next heir to the estate; and she being aunt to the pursuer, her husband is an incompetent witness. An agent can only be received where, from *the nature of the case*, there is a *penuria testium*—Lang, 16th November 1814. In the present instance, the defender says that the fact to be proved was universally known.

The objection is much weakened by stating it as merely agency. He has to this hour acted as *dominus litis*, and has been more active than is proper even in a party.

Agency is said to be no longer an objection. M'Latchie's was a most limited case


of agency ; and in the later case of *Sundius v. HAMILTON, &c.* Sheriff, *n. r.** a witness was rejected, as he ^{vs} HARVEY, &c. had been present at one consultation ; and the Court adhered, on a remit from the House of Lords. Reid's case shews, that if he is more than nominal pursuer, he cannot be received.

LORD PITMILLY.—By the forms of Court, the debate is concluded ; but I wish to hear what is to be said as to the fact of the agency.

Clerk.—It is no good objection, that a person is nominal pursuer, heir, tutor, or agent ; and if these objections are not good separately, they cannot be so when combined. In this case the witness is neither pursuer, heir, nor tutor ; he only gave his advice as curator. Sundius's was a strong case of agency ; and the House of Lords disapproved of the objection. The agent who was rejected in Newton's case, was called to prove, what it is doubtful if any man would now be allowed to prove, that the de-

* This case is mentioned at pp. 21 and 40 of the Form of Procedure in the House of Lords, published in 1821. It is there stated to have been decided on the 26th November 1811.

HAMILTON, &c. fender promised to pay the sum in a bond
v.
HARVEY, &c. which had been proved a forgery.



LORD PITMILLY.—Several objections have been stated to this witness. 1st, It is said he was tutor to the late Mr Hamilton, and that he then brought an action similar to the present. This might be a circumstance affecting his credit, but could be no ground for rejecting his evidence. 2d, It is said he is curator to the son; but the son is now of age, and the curatory has fallen. 3d, That he has been an active agent.

If the curatory had subsisted, and he had been an active agent, I would have decided this on the principle of Reid's case, which is confirmed by that of Sundius; but this case is different, as the curatory has fallen, and the objection is confined to the agency.

My opinion is, that agency is a good objection by the law of Scotland, though there are special circumstances in which an agent may be examined. In the present case, it is stated, and not denied, that the witness acted as agent,—that he is *dominus litis*,—and examined the other witnesses. In these circumstances I must sustain the objection.

One of the heritable creditors was called **HAMILTON, &c.** as a witness for the defenders, to prove a letter **HARVEY, &c.** by them in 1797, urging a sale of the property. After the letter was read,

A letter dated in 1797, received on a question as to a sale of property in 1801.

Clerk, for the pursuer, objected.—This letter cannot prove that the sale in 1801 was at the instance of the heritable creditors.


LORD PITMILLY.—I cannot sustain this objection at present. They may produce a series of letters, down to 1801; and if they do not, their not doing so may be fair matter of argument to the Jury.

A witness was asked, whether the house built by the defender was a suitable one?

Cockburn objects.—This is not in the Issue. In opening the case, I merely mentioned it as matter of argument.

Jeffrey.—It was quite right to state it, and we must be allowed to prove it. Whether the improvements were extravagant, is certainly a competent question.

LORD PITMILLY.—It is of great import-

HAMILTON, &c. ^{vs}
HARVEY, &c.  ance in all cases, and especially in one of such length, to keep within the Issue, and not confuse the Court and Jury by proof of extraneous matter; and it appears to me that this is not within the Issue. From having looked into the proceedings in the Court of Session, I know that there was a good deal of argument on this subject, but the Court have not sent it here. The question, therefore, is incompetent.

Jeffrey.—The question here is not whether this was a fair transaction, but whether certain facts are proved or not. We shall prove that the full value was paid; and that the fact of the insanity was not known to those of the defender's rank, who lived near. Aitchison acted for Hamilton while sane, and there is no motive assigned for his acting fraudulently.

Cockburn, in opening the case, and *Clerk* in reply, stated—The insanity was notorious in the neighbourhood. The defender was on an intimate footing with Aitchison, and must have known it before making the purchase. At all events, it is proved that he was informed of it before he began his improve-

ments. The price paid was not near the value, though there is some contrariety of evidence on this subject.

HAMILTON, &c.

v.
HARVEY, &c.

LORD PITMILLY.—The following are the facts out of which this question arises. The late Mr Hamilton, along with another person, granted an heritable bond for a debt due to a Coal Company; and for several years prior to the property being sold, it had been in contemplation to compel a sale, under that clause in the bond which empowers the creditor to sell. This bond is followed by a factory in 1796, empowering Aitchison to sell. Then there are letters in 1797, from the creditors, urging him to sell. After that, there is a trust-deed in 1799, upon which Aitchison was infeft, in virtue of which, he, in February 1810, sold the property to Harvey. The disposition is in 1801, and the creditors are consenters to the sale.

It is said that Hamilton became insane early in 1799, and that he left the regiment, and was, in November 1799, brought to Scotland, where he died in 1802. A question was raised on the trust-deed—an action was brought against Aitchison, and the trust-deed has been set aside; but the question

HAMILTON, &c. with Harvey still remains. Another ques-
HARVEY, &c. tion is, on what principle are the parties to
adjust the sum laid out in melioration? These
are difficult points of law; but they are not
here. All we are concerned with are the
facts; and we must suppose them important
to the after decision of the questions of law in
the Court of Session.

You may dismiss from your minds all the
other points, and attend solely to the Issues.

1st.—On this Issue there is an admission
by the party, of the fact, which is the best evi-
dence; and the simplest way to dispose of
this Issue is to find for the pursuer.

2d.—This is the most important Issue; and
you must keep the whole evidence in view,
and bend your minds to the facts which took
place in the months of June and July 1800.

The pursuer has undertaken, and is bound
to prove this Issue: the defender is not bound
to prove any thing. It is admitted that
there is no direct evidence, and that you are
to draw your conclusion from circumstances.
You are not, however, to take these sepa-
rately, but must consider the whole; and if
you are satisfied, on a view of the whole, you
will find accordingly. You will consider the
evidence as to the notoriety of the insanity,

You will also observe, that he was in constant communication with Aitchison, who must have known the fact. On the other hand, the witnesses for the defenders, though creditors, and connected with this sale, did not know of the insanity. There were also two persons who had been in the service of Hamilton at the time, who did not know it. The direct communication of the insanity made to him by Mr Burns, is said, on the one side only, to apply to the third Issue, but in my opinion it also applies here. There can be no doubt that this conversation took place ; and the only doubt is, whether it took place before the sale. You must make up your minds on the subject, taking into view the evidence of the other witnesses. I do not think there is sufficient evidence that it took place before July 1800, though Mr Burns states it to have been in 1799 or 1800.

3d.—This requires attention to dates. The improvements did not begin till 1804 ; and though I did not think Mr Burns' conversation took place before the sale, still I think it did take place before 1801. It is said he is a single witness ; but it is not necessary to have two witnesses to each fact. His evidence is quite sufficient in law.

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v.
HARVEY, &c.

The judicial proceedings in the other action, though directed against Aitchison, are also circumstances to be considered.

4th.—Here there are two points: 1st, Was the price adequate? The evidence for the pursuers would raise the value far above the price paid; but on the other side there is what I consider a preponderating weight of evidence; but my opinion is not to be regarded, unless in so far as it agrees with yours. 2d, The creditors urged Mr Aitchison to sell, and would have sold it, but thought the method adopted less expensive. If you think the price adequate, you will find for the defenders.

Verdict “for the pursuers on the 1st, 2d, “and 3d Issues;” and “for the defenders on “the 4th Issue.”

Clerk, Jardine, and Cockburn, for the Pursuers.

Jeffrey, J. S. More, and Grahame, for the Defenders.

(Agents, Thomas Johnstone and William Ellis.)

CHRISTIAN v. LORD KENNEDY.

1818.
November 27.

THIS case was tried on the 6th day of July 1818, and the report will be found at p. 419 of the first volume. The Court of Session granted a rule to shew cause why there should not be a new trial in this case.

New trial refused; damages not excessive.

Jeffrey shewed for cause, that granting a new trial is one of the most delicate duties the Court have to perform, and is a remedy for an erroneous verdict, of recent introduction. The defender has not made out his case. Damages cannot be said to be excessive, when they are only a little more than double the sum the *party* expected to pay. It was said the expressions were used in the heat of blood, and were warranted. That is disproved by the report of the evidence.

Grant on New Trial, 213.

Clerk.—I am sorry to find the Court doubtful about granting a new trial, when the damages are so excessive. The dictionary shews, that up to 1800 the highest damages given in a case of this description, were L.40 (see

CHRISTIAN
v.
LD. KENNEDY.

M. 13,923). Since then L.50 were given; Hutchison v. Naismith, 18th May 1808. M. App. Delin. No. 4. And in an aggravated case, where the defender was a man of fortune, L.300 were given; Caddel—*n. r.** Even in the Jury Court the sums have been only L.100, L.5, L.900, and L.80, for a most impudent libel.

LORD ROBERTSON.—As this is not a case of difficulty, I shall state my opinion in one word—that there is no ground for a new trial. But in the infancy of this institution, it is perhaps right to say a few words on the principles on which new trials ought to be granted.

Granting a new trial is in the discretion of the Court; but it is not to be rashly or hastily exercised. Were we to grant new trials on the ground that the sum is larger than we would have given, this would in fact be taking out of the hands of the Jury the assessment of damages. It is only in cases where the damages are out of all bounds excessive, that

* See 3d July 1798, M. 12,010; and 19th January 1799, M. 12,375.

the Court will interfere. This is an action CHRISTIAN.
 for falsely and injuriously aspersing the cha- LD. KENNEDY.
 racter of the pursuer; and it is the peculiar
 province of the Jury, by the law and consti-
 tution of the country, to assess the damages;
 and I should be sorry to disturb it. I have
 heard nothing here to satisfy me that the da-
 mages are excessive. On two occasions the
 defender might have retracted; and the evi-
 dence shews the pursuer's character was fair
 at the time. In these circumstances, no new
 trial ought to be granted.

LORD GLENLEE.—I am against a new trial, but must confess, that, though a verdict is not to be rashly touched, yet, if excessive damages are given, it must be taken into serious consideration. A verdict is not to be touched for a few pounds; and in this case I do not think the Jury have given more than I would have done.

In Caddel's case, the nature of the injury was very different. Here it is accusing a man of dishonesty in his profession; it is falsely and injuriously accusing him of having cheated—there is the sting. He might act as a scoundrel with some, and not so with others; but if it was believed that he cheated Lord

CHRISTIAN. Kennedy, who would employ him? This is
LD. KENNEDY. a verbal injury; not mere scandal or defama-
tion; and every case depends on its own cir-
cumstances. If Lord Kennedy was unable
to pay this sum, the case might be different,
as I am not prepared to say it would not be
excessive, if perpetual imprisonment were the
consequence.

The other Judges expressed their con-
currence in this opinion, and the new trial
was refused.

PRESENT,
LORD GILLIES.

1818.
November 30,

GRAHAM v. GRAHAM.

Value of a
house, and of
political inte-
rest, ascer-
tained.

AN action to compel payment of half the
value of certain property, said to be contain-
ed in an agreement betwixt the parties.

DEFENCE.—By the agreement, the de-
fender was the sole judge of the value, and
whether any value was to be given. The
pursuer admitted that he had no legal claim

Political interest is not legally a subject of valuation.

GRAHAM
v.
GRAHAM.
—

ISSUES.

“ What was the value of the mansion-
“ house and offices upon the estate of Kin-
“ ross, at the time the defender succeeded to
“ said estate, under the transaction with the
“ pursuer ?

“ What was the surplus value of the policy
“ or pleasure ground about the said mansion-
“ house at the time aforesaid, over and above
“ the value accounted for under the reference
“ to Mr Adam, and consequent settlement ?

“ What was the value of the superiorities
“ and political interest upon the said estate,
“ and those lying in the county of Fife, to
“ which the said defender succeeded, in virtue
“ of said transaction, at the time the defender
“ so acquired right to them ?”

The late Mr Graham of Kinross conveyed his estate to trustees, for behoof of his son the pursuer, under certain conditions.

The pursuer, entered into a transaction with the trustees, by which they agreed that he should have the value of half of the estate, as

GRAHAM
v.
GRAHAM.

that should be ascertained by Mr Adam of Blairadam. The trustees having objected to any value being put on the house, and the political interest in the county, the pursuer agreed to accept of such value as his uncle, the defender, might put upon them. Mr Selkrig, accountant, was employed to make the division, after having satisfied himself of the value of the estate; and his valuation was approved of by Mr Adam. In the valuation, two views were taken of the value of the avenue in front of the house: it was valued at L.72 per annum for tillage, and L.42 for pasture; and Mr Adam adopted the latter sum as the value.

Jeffrey, for the defender.—The trustees refused to value the house, &c. as they thought it disproportioned to the estate. The value put on it by the witnesses we think extravagant, and shall prove it of no value in reference to the estate. In consequence of the decision of the Court, the Jury must value the political influence, though that was never before considered a marketable commodity.

Clerk.—The value in this case does not depend on the special circumstances, but on

the real value of the house and votes, as this was to be a fair division of the estate.

GRAHAM
v.
GRAHAM.
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It is ridiculous to say the votes are worth nothing. It is by keeping them out of the market that the defender has twice put himself into parliament.

**LORD GILLIES.**—Much has been stated that is most material; but there has also been a great deal stated by way of explanation, which we must throw entirely out of our view, so far as that is possible.

We must confine our attention to the terms of the Issues, as it is by them we are limited; and we must put a fair value on the house, &c. as between man and man.

**1st Issue.**—It is vain to say that the house is worth nothing. It is proved, that, as a quarry, it would sell for L.800 or L.900; and if the proprietor keeps it up, he must consider it as worth more. We are to consider the value of the house, or its worth in the market, in reference to the estate on which it is situate. That the house is too large, was sworn to by almost every witness; but none of them said the offices were too large.

The question is the value of the house

GRAHAM

v.

GRAHAM.

where it stands ; and to this point Mr Brown is almost the only proper witness. The architects do not differ much from him ; but they are not the proper persons to give an opinion as to its value, in reference to the estate. In opposition to their evidence might be placed the opinions of those gentlemen who considered the house a disadvantage.

It appears to me, that your good sense will probably put a value of L.1000 or L.1200 upon the offices ; and something between L.900 and L.4500 upon the house.

*2d Issue.*—If you consider the house as a residence, the value of the avenue must remain as it is : if you consider the house as a quarry, then the higher value must be put on the avenue. But I consider Mr Selkrig's report to fix the value at the time, for either alternative, as he employed professional persons.

*3d Issue.*—On this we must banish all that was said of the discussion in the other Court. We are merely to return the value of the superiorities, deducting the feu-duties and the casualties. This value is what they would have sold for at the date of the agreement, if that can be ascertained. There is no direct proof of the value at that date ; but you

have proof that recently the L.1 Scots sold for 20s. sterling, and that in 1810 it sold for 15s. It has not, however, been proved that the value rose from 1802 to 1810, and probably the rise was not great.

GRAHAM

v.

GRAHAM.

Some of the witnesses considered, that if the whole superiorities were offered for sale at once, the market might be glutted: but they merely formed their opinions on general reasoning, and an answer was made, worthy of consideration, that the whole might be an object to any person who wished the command of the county.

We are not to overset the award of the arbiter, but to put a value on what was excepted from the submission. This is an intricate case, but I have no doubt you will make a proper return upon it.

As the party seems to wish it, you may return that you took such a sum of valuation at so many shillings sterling for the pound Scots; and should the Court of Session think there were other votes which ought to have been included, they can easily do so.

Verdict.—“The Jury found L.5000 as the value of the house and offices, and L.7845. 8s. as the value of the superiori-

GRAHAM

v.

GRAHAM.



“ties; and that no surplus value had been  
“put on the policy and pleasure grounds.”

*Clerk, Cunningham, and Robertson, for the Pursuer.*

*Jeffrey and Cockburn for the Defender.*

*(Agents, James Robertson & Son, w. s. and John Campbell, w. s.)*

Expences re-  
fused, an ap-  
peal being en-  
tered.

On 31st December 1819, a motion for the expences was dismissed, on the ground that an appeal had been presented to the House of Lords, against the decision of the Court of Session.

PRESENT,  
LORD PITMILLY.

1818.  
December 16.



TENNENT & Co. v. HODGE.

A Jury dis-  
missed of con-  
sent, without  
returning a  
verdict.

IN this case, after the Jury were sworn, but before the case was opened for the pursuer, the parties agreed to a compromise.

Mr Jeffrey proposed, that the Jury should of consent find a verdict in terms of the compromise. This was objected to on the other side.

Counsel then gave in a minute, consenting that the Jury should be dismissed ; and upon this consent, Lord Pitmilley granted an order accordingly.

TENNENT, &c.  
v.  
HODGE.

(Agents, *William Ellis*, and *John Young, Jun.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

SNADON v. STEWART.

1819.  
January 11.

DAMAGES claimed for arrestment of a vessel, and for calumny.

Damages claimed, but not found, for arrestment of a vessel, and defamation.

DEFENCE.—The vessel was not arrested as belonging to the pursuer. The calumnious expressions were not used.

ISSUES.

“ 1st, Whether, on Wednesday the 11th  
“ day of March 1818, or about that time,  
“ the defender John Stewart arrested or  
“ caused to be arrested a vessel, then ly-  
“ ing in the harbour of Leith, called the  
“ Janet of Kennet, with her float-boat, fur-

SNADON  
v.  
STEWART.

“ niture and apparelling, the property of the  
“ pursuer, in virtue of a precept of arrest-  
“ ment from the Court of Admiralty, at the  
“ instance of the said defender, against James  
“ Snadon, coalmaster, Kennet colliery, where-  
“ by the said vessel was detained for some  
“ time in the port of Leith, to the loss and  
“ damage of the said pursuer ?

“ 2d, Whether, when the pursuer call-  
“ ed upon the defender, in order to shew  
“ him that he, the pursuer, and not James  
“ Snadon, was the owner of the said vessel,  
“ for the purpose of getting the defender to  
“ loose the arrestment, Whether the said  
“ defender did insult or abuse the pursuer,  
“ and did say that he the pursuer was a swind-  
“ ler or cheat upon the public, or did on said  
“ occasion use expressions of that import, or  
“ to that effect ?

“ Damages and solatium claimed in sum-  
mons, L.500.”

About the 11th March, the defender ar-  
rested the vessel as belonging to *James*  
*Snadon*, his debtor ; and an execution of ar-  
restment was put on the mast about one  
o'clock, which remained there for an hour.

At this time the cargo of coals was not fully discharged; and it was stated, that the vessel, after her cargo was discharged, required to take in ballast, so that it was impossible for her to sail that evening. On the other side, it was stated that she might have sailed.

SHADON  
vs  
STEWART.

In the evening, the pursuer and his brother went to the law agent of the defender, and shewed him the register of the vessel; upon which he said, that if the vessel belonged to *John*, the pursuer, she might sail when they pleased. On seeing the indorsation of the registry, the defender said to the agent, in a whisper, that may be a way of cheating the public, but he (the agent) did not believe the pursuer could hear it. This was the only proof offered of the calumny.

The collector of the customs at Alloa was the first witness called, and was asked whether there was an entry of the registry of the vessel in the books.

Parole evidence of the contents of a written document incompetent.

*Jeffrey*, for the defender, objected.—The register is the only proof of ownership. It ought to have been produced eight days before the trial. Even if it had not been in the

A. S. 10. Feb. 1616, § 24; A. S. 9. July 1817, R. pp. 79, & 93.

SNADON  
v.  
STEWART.



possession of the other party, he was bound to take a diligence to recover it.

*Clerk*, for the pursuer.—The rule is a good one, but does not apply. The register must go with the vessel, and the master is here to produce it, if necessary. Not being in our possession, we are entitled to parole evidence. It is sufficient if we prove reputed ownership.

**LORD CHIEF COMMISSIONER.**—It is premature to discuss whether the register is the only proof of ownership. The question at present is, whether we are to allow parole evidence of the contents of a written document. This I hold to be incompetent.

Incompetent to produce a copy of the registry of a vessel taken from custom-house books.

The witness was then asked, whether he had taken from the books of the custom-house, a copy of the registry; to which an objection was taken, and sustained.

A written document must be produced before a trial.

The master of the vessel was then called, and stated, that it was his duty to keep the certificate of registry.

*Clerk.*—We intend now to call on the witness to produce the registry. It was impossible to produce it before the trial, as the master must have it, to prevent seizure of the vessel.



*Jeffrey.*—The register is the only evidence of ownership. There was no impossibility of producing it; and as the pursuer has failed to do so, he cannot prove this fact.

SNADON  
\*  
STEWART.  
Bell, Bank.  
Law, p. 75.  
(164).

**LORD CHIEF COMMISSIONER.**—It is painful to decide on questions of this sort, where a technical form stands in the way of material justice, or at least delays it. In a former case, *Clark v. Thomson* (see Vol. I. p. 161), we decided that the rule must be adhered to, notwithstanding the inconvenience to the party.

We do not decide whether the registry is the only evidence of ownership; or whether, in a case of this sort, it is sufficient that he was reputed owner. In many cases the register is the only admissible evidence; but in this case it is doubtful if it is necessary to be so strict.

The only question at present is, whether it is competent for this witness to produce the register, or whether it ought to have been produced before the trial. The first branch of the Act of Sederunt 1816 is imperative. There is not the discretion allowed which is given in the second branch, as to witnesses. The Act of Sederunt 1817 does

SNADON  
v.  
STEWART.



not seem to make any alteration. We are therefore obliged to say that this document cannot be produced. We must look to the words of the law, and cannot listen to the plea of the difficulty of producing it before.

If this Court had an original jurisdiction, the party here might suffer a nonsuit, and would only be subjected to the trouble and expence of this trial; but at present a more circuitous mode must be followed, and an application made to the other Court for a new trial. -

We can only decide that the Act of Sedes-runt applies. If it is inaccurate, it may be altered to suit future cases.

LORD PITMILLY.—I am of the same opinion. It is of consequence that writings should be produced, to prevent surprise. There is a mode in which this object might have been obtained: if the original could not be produced, a commission might have been taken, the master called as a haver, and a certified copy of the register taken; and if the defender had refused to admit such certified copy, in these circumstances the Court might possibly have interfered.

However hard on the party, it is of much

more importance that the rule should be strictly adhered to.

SHADON  
v.  
STEWART.

*Clerk.*—Before the witness is called back, I may state, that I mean next to ask who was owner in March last. When a person comes claiming a vessel as his, the registry may be the only proof of who is owner at present; but parole is the only evidence of who was owner at a former period.

*Jeffrey.*—I am uncertain whether I ought to answer this question, put by anticipation.


LORD CHIEF COMMISSIONER.—Mr Clerk states, that he means to prove the ownership of the vessel by parole evidence. It is just as well to answer it now.

*Jeffrey.*—It is a mistake to say that it is only the present ownership that requires to be proved by the register. All the cases in Bell and Abbot are cases of a prior period. Indeed, it is impossible that it could mean the ownership at the moment of the trial.

In an action of damages for arresting a vessel, *prima facie* evidence of ownership sufficient.

The pursuer has tendered the register, shewing that he knows it to be the proper evidence. It lasts as long as the vessel, and transfers are indorsed upon it. In questions with a third party, proof of reputed ownership

SNADON  
v.  
STEWART.



has been allowed; but there is *no* instance where it was allowed in a penal action, like the present, between the original parties.

LORD CHIEF COMMISSIONER.—This is not a question of the law of Scotland, but of general law; and therefore the authorities in the law of England may be referred to. I remember the origin of the law of registering. The first Act on the subject was brought in by Lord Liverpool, when Lord Hawksbury; and the intention of the law was, to keep the transfer of the vessel clear; not to tie up the hands of parties, in cases like the present, where *prima facie* proof is sufficient.

A case similar to the present is that of an injury done by an officer of the revenue. In that case, it is not necessary to prove, by production of his commission, that he is an officer. It has been held sufficient, if the party proves that he acted as such.

Abbot, Law of  
Shipping, p. 82.

We have hitherto only decided, that if the registry was to be founded on, it ought to have been produced, in terms of the Act of Sederunt; but we had this objection also in contemplation. Abbot states, that presumptive evidence of property is sufficient; and we think this authority goes the full length of

shewing the competency, in a case like the present, of proving reputed ownership.

SNADON  
v.  
STEWART.  


*Jeffrey* requested his Lordship to note this decision.

LORD CHIEF COMMISSIONER.—I shall do so ; and if it is made the subject of discussion elsewhere, the grounds on which it is founded ought also to be made the subject of statement.

An objection was taken to a question, whether the vessel was arrested, and whether it was at the instance of Stewart.

In proving an arrestment of a vessel, the execution of arrestment ought to be produced before adducing parole evidence.

LORD CHIEF COMMISSIONER.—I conceive the regular method is, to put in the papers, and then to prove, by the witness, the facts which took place—who came on board the vessel—what was done, &c.

The witness having stated that the pursuer was owner of the vessel, was asked, on his cross-examination, on what grounds he founded his opinion ?

In re-examining a witness, it is incompetent to commence an examination in chief.

In re-examining the witness, Mr Clerk wished to ask whether he had seen the register ?

LORD CHIEF COMMISSIONER.—I do not

SHADON  
v.  
STEWART.

think it competent, in re-examining, to commence an examination in chief.

On a similar question being put to the next witness, his Lordship stated, that if the witness spoke from recollection of having seen the written document, the evidence was inadmissible.

Incompetent  
to state to a  
witness a par-  
ticular expres-  
sion, and ask  
whether it was  
used.

Mr Clerk asked a witness, whether he met the defender, and whether they talked of the arrest? The witness not recollecting the conversation, Mr Clerk then asked him, whether the defender made use of a particular expression, and maintained that he was entitled to do so, after putting the general question.

LORD CHIEF COMMISSIONER.—This is a leading question. My objection to it, is not the incompetency of putting a particular question, but of putting into the question, the answer you wish the witness to give.

An objection was taken to proof of a conversation in the office of the agent for the defender.

LORD CHIEF COMMISSIONER.—It must be proved that the defender was present, or

it must be inductive to some admission on his part.

SHADON  
v.  
STEWART.  


*Clerk*, in opening the case, admitted that he could not prove direct damage, but maintained, that the pursuer was entitled to some damages, on account of the injury done to his credit by the arrest, and to his feelings by the defamation.

*Jeffrey* trusted that, as Juries were ready to give proper and exemplary damages in cases of real injury, so they would give none in such cases as the present, where no injury was done, and where the arrestment proceeded from pure, and not culpable mistake.

The defender only stated, that the transfer of the vessel might be a way of cheating the public; and this being said to his agent privately, is not actionable.

LORD CHIEF COMMISSIONER.—This is a very short case; and the first point presented in the Issue is, whether the vessel was arrested. Upon this we held it sufficient for the counsel to prove a *prima facie* case of property in the pursuer, and we think they have

SHADON.  
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STEWART.  


proved it. It is also proved, that it was arrested as the property of his brother.

It is quite clear, from all the evidence, that the arrestment arose from mere mistake; and in case of mistake, a party is only entitled to the actual loss he can qualify. As to the delay, I construe what is stated in the Issue to imply, that it must have been detained by a culpable act of the defender, for the detention is coupled with (not disjoined from) the loss and damage, &c.

It does not appear to me, that any damage has been proved; and I agree with the counsel for the defender, that frivolous actions of this nature ought not to be encouraged.

I cannot state to you, in point of law, that in consideration of the unnecessary expence, you ought to find for the defender. But I believe, if you do find for him, the Court above will not disapprove of the verdict.

The second Issue is as feebly, or more feebly, supported than the first. I therefore leave the case with you; but feel satisfied, that if you find for the pursuer, you will fix a small sum of damages.

Verdict—"For the defender upon the first



“ Issue, as no damage is proved ; and also find  
 “ for the defender on the second, as it is not  
 “ proven.”

SNADON  
 v.  
 STEWART.

*Clerk and Dalzeil for the Pursuer.*

*Jeffrey and Cockburn for the Defenders.*

(Agents, *Wm. Landers*, and *M. Burd*, w. s.)

PRESENT,

LORD GILLIES.

# **BELL v. LEIGHTON and DONALD.**

1819.  
 January 18.

AN action of damages for breach of contract  
 against Leighton as principal, and Donald  
 as agent and broker, for not delivering a quan-  
 tity of tallow sold to the pursuer.

Damages for  
 breach of con-  
 tract by not  
 delivering tal-  
 low.

DEFENCE for Leighton.—No authority  
 was given to make, nor did he confirm the  
 bargain.

The LORD ORDINARY repelled the de-  
 fence, and found the parties conjunctly and se-  
 verally liable in damages.

BELL  
v.  
LEIGHTON, &c.

## ISSUE.

“ What loss and damage has been sustain-  
“ ed by the pursuer, in consequence of the  
“ non-delivery of 12 casks best yellow candle-  
“ tallow sold to him by the defender, William  
“ Donald, as agent for the other defender,  
“ George Leighton, in October 1813, at 94s.  
“ per cwt. ?”

Belief of a ge-  
neral agent  
held evidence  
of current pri-  
ces, though he  
did not make  
sales at the  
time in ques-  
tion.

One of the witnesses, on his re-examination, was asked, whether there were not circulars printed of the prices of tallow at different times? and what was the price of tallow in January and February 1814?

*Jeffrey*, for the defender, objected.—The witness has stated, that he made no sales at that time, and therefore cannot prove this fact.

LORD GILLIES.—The belief of a general agent is certainly evidence. It may be strong or weak, according to circumstances.

*Fletcher* opened the case for the pursuer, and maintained, that, as damages were found due, the Jury must find him entitled to some; but to shew that there was no foundation for Leighton's defence, he read the letters from

him, on which the finding of damages was founded.

BELL  
v.  
LEIGHTON, &c.

The pursuer is entitled to the highest price he can prove that he might have got for the tallow.—*Morison v. Boswell*, 4th March 1806, *M. App. Dam. & Int.*

*Morison v.  
Boswell.*

*Jeffrey*, for the defender.—If no damages are proved, none can be found. The pursuer has not proved that the tallow arrived; and if it did not arrive, the loss ought not to fall on Leighton, as there was nothing fraudulent on his part.—*Boyd v. Siffkin*, 2 *Camp.* 326.—*Idle and Others v. Thornton and Others*, 3 *Camp.* 274. If it arrived, and he proved actual loss, I must have repaired this loss, whether my failure was fraudulent or not. In the case of *Boswell*, there was an attempt to cheat. A case nearer the present is *Robertson v. M'Culloch*, 23d December 1808.

*Boyd v. Siffkin.*

*Idle v. Thornton.*

*Robertson v.  
M'Culloch.*

LORD GILLIES.—The case we have to try is stated in the Issue, and is a very short one, and keeping this steadily in view, we have next to attend to the facts. That a bargain was entered into, and broken, has been found in the Court of Session.

In my opinion, it was quite unnecessary to lay these letters before you; and the ar-

BELL  
v.  
LEIGHTON, &c.

gument on the other side appears to me out of place, as damages have been found due, and you cannot find that there was no bargain.

It is said no damages are due, as, in October, the pursuer might have bought other tallow at the same price. If this is to be listened to, there can be no damages in any case. It is said we must find the defender's conduct fraudulent. This may be necessary to entitle the pursuer to a *solatium*, but in the present case, it is not necessary to impute blame to any person. The defender appears to have acted with propriety, but he did not implement his bargain, and must therefore pay what the pursuer has lost.

The bargain is 90 cwt. at 94s. If you think 110s. has been proved as the selling price, then you will give 90 times 16s.

*Cockburn.*—I hope your Lordships will think, that the Jury may give a slump sum.

LORD GILLIES.—I conceive it to be clearly proved, that there were 12 casks, and that a cask contains  $7\frac{1}{2}$  cwt. A slump sum is the simplest way, but this must be ascertained by calculation.

*Jeffrey.*—I consent to holding the quantity 90 cwt.

Verdict—" For the pursuer, damages L.92  
12s. 6d.

BELL  
v.  
LEIGHTON, &c.

*Cockburn and Fletcher for the Pursuer.*

*Jeffrey and Hope for the Defender.*

(Agents, *David Murray, w. s. Gibson, Christie, and Ward-  
law, w. s. and Dugald Mactavish, w. s.*)

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PRESENT,  
LORD GILLIES.  
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### HOULDSWORTH v. WALKER.

1819.  
January 28.

AN action to compel the defender to furnish coal or culm for steam-engines, and of damages for failing to supply it.

Damages  
claimed for not  
supplying  
steam-engines  
with coal.

DEFENCE.—The contract is not binding, as it was not signed by all the parties to it. The pursuer broke it by misapplying the power of the steam-engines.

### ISSUES.

" Whether the defender has furnished  
" coal or culm, in terms of the contract enter-  
" ed into between Henry Houldsworth, cot-

HOULDSWORTH

v.  
WALKER.

“ ton-spinner at Anderston, the deceased  
“ Alexander Pollock, and James Gillespie,  
“ manufacturers in Anderston, carrying on  
“ business under the firm of Henry Houlds-  
“ worth and Company, cotton-spinners at  
“ Woodside and Anderston, and the defender  
“ Andrew Walker, coal-master at Gairbraid,  
“ upon the 21st October 1804, for the use  
“ of the cotton-works, in which Henry  
“ Houldsworth and Company, and those  
“ standing in right of that company, have  
“ been, or are now engaged at Anderston  
“ and Woodside, or elsewhere; or whether  
“ the claims of the pursuer, under this con-  
“ tract, were settled up to the 31st December  
“ 1807, by a settlement of accounts between  
“ the parties?

“ And whether any loss and damage has  
“ been sustained by the pursuer, in conse-  
“ quence of the defender's non-performance  
“ of said contract, by failing to furnish coal  
“ and culm for the pursuer's cotton-works, in  
“ terms of the same, and to what amount?”

In 1804, the parties entered into a con-  
tract, by which the defender became bound  
to furnish Henry Houldsworth and Company  
with such a quantity of small coal, or culm,

as should be sufficient to supply with fuel, the whole works now erected, or to be erected, “ in their present or future works, at Woodside, Anderson, or elsewhere ;” with a declaration that, if the defender failed, the other parties were to be entitled to supply themselves from other coal-works, at his expence, and that the account and oath of the acting partner at the pursuers’ works, should be held sufficient proof of the quantity so furnished.

HOULDSWORTH

v.  
WALKER.

Some time after the date of this contract, a steam-engine of larger power was erected at Anderston, and the whole of the power not being required in the cotton-work, part of it was at one time employed in a foundery, and to pump water for the Cranston Hill Water Company. The defender conceiving this a misapplication of the fuel, and that he was only bound to furnish coal for the cotton-mill, at first supplied only a small quantity, and for some time did not supply any. The pursuer applied to the Sheriff, who pronounced a judgment enforcing the contract. The case was referred to arbitration, but the decret pronounced was set aside by the Court of Session, in an ac-

**HOULDSWORTH** tion at the instance of the defender. The  
**WALKER.** application to the Sheriff was renewed, and  
the defender being dissatisfied with the decision, brought it under review by advoca-  
tion; an action of damages at the instance of the  
pursuer was conjoined with it, and the above  
Issues were sent.

In opening the case for the pursuer, Mr Jeffrey stated, that he wished to put into the hands of the Jury a report by an accountant, not as evidence, but as his averment, and to save the Jury the trouble of taking it down from his statement.

*Grant*, for the defender.—We must object to any thing that is not evidence being put into the hands of the Jury.

**LORD GILLIES.**—It is impossible for me to take down 28 folio pages of figures.

When Mr Jeffrey concluded his speech,

**LORD GILLIES.**—I would suggest, in order to do justice in such a case, that the pursuer should call his evidence to the first part of the first Issue. If he fails there, then the case is at an end. If, on the contrary, he succeeds, then he is clearly entitled to da-



gages, and the Jury may find so; but the amount of the damages parties ought certainly to refer to arbitration.

HOULDSWORTH

v.  
WALKER.

How is it possible for the Jury to go into this *mare magnum* of papers, books, accounts, scientific evidence, &c. It is impossible for the Court to do so, and I suppose it is equally so for many of the Jury. That damages are due, we may find, but the amount we cannot fix. I find it incompetent to suggest a reference of the first point; but being charged with the time of the Jury, I must suggest a reference of the second.

*Grant.*—At present I am only entitled to refer the whole case, and have no doubt that we shall shew that there is no foundation for the action; but in the course of the proof I may be satisfied that it is proper to refer part.

*Jeffrey.*—We are most anxious to save time, and to adopt the course pointed out; but if the defender is to plead the application of the engine to pumping water as a total defence, we must lead proof on this subject, along with proof of the quantity of fuel necessary for it.

After several witnesses were examined, and

HOLDENORTH

WALKER.

A copy of a letter received as evidence, on proof of the practice to dispatch the originals of which copies were kept.

a protest produced, the defender was called, and desired to produce several letters from the pursuer; but not producing them,

*Jeffrey.*—We produce the letter-book in which the copy is entered.

*Grant.*—You must prove that the letter was sent, and that the copy is a true one.

*Jeffrey.*—We have only to prove this the true letter-book, and that the clerk believes the principal was sent.

LORD GILLIES.—I understand that you mean to prove that this is a true copy, and that it was the regular practice to dispatch, to the persons to whom they were addressed, the original letters of which copies were entered in that book.

*Jeffrey.*—The clerk who copied the letter is dead, but we shall prove his hand-writing, and the regular practice of sending the originals.

After two witnesses were examined on this subject,

*Grant.*—The same principle must hold in this case as in the delivery of goods. Delivery must be proved by the person who delivered them; but if he is dead, proof has been admitted of an entry in a book regularly kept by him.

Proof, however, has never been allowed that a person wrote in the book, whose duty it was not to keep it.

HOUNDSWORTH

WALKER.

*Jeffrey.*—This is a regular letter-book, and is better evidence than the clerk would be, were he alive, as this entry cannot be *ex post facto*.

LORD GILLIES.—It is impossible to prove any particular letter sent to the post-office, and therefore a letter-book is received, provided it is proved that it was customary to send the letters, and that the witness has no reason to doubt that the one in question was sent. I have therefore no doubt of the competency of producing the letter-book. I do not think it makes any difference that the clerk is dead, as, if he were here, he could only prove the writing. The witness has proved the writing, and that it was the practice to send the letters, copies of which were entered in this book.

After producing certain documents,

*Jeffrey.*—By not going into the evidence in detail, I give up strong proof on this first branch of the case; but I now call on the other party

HOULDSWORTH

v.  
WALKER.

to say whether they are willing to refer the amount of the damages.

*Murray.*—We cannot form any opinion till the pursuer has concluded his proof.

**LORD GILLIES.**—This question arises from the fault, partly of the pursuer, partly of the defender. The pursuer erected an engine of superior power to that which was in the contemplation of the parties at the time of entering into the bargain, and applied part of this power to a different purpose. This gives rise to great intricacy of proof, and affords a reason for submitting the whole case, or at least part of it, to arbitration.

A witness, though not interested in the question put, is incompetent if intrusted in the event of the case.

The foreman of the foundry was called as a witness, and stated, that he was paid a share of the profits of the foundry.

An objection was then taken to his evidence; to which it was answered, that he had no interest in the question put—that the pursuer meant to prove the quantity of coal necessary for the foundry, and deduct it from the quantity demanded from the defender.

**LORD GILLIES.**—This witness has a share

in the profits of the foundry, which is wrought by the steam-engine for which the defender engaged to supply coal. The defender was only bound to supply coal for the cotton-work, and this witness has an interest to diminish the quantity applied to work the foundry. If a witness is interested in the result of the trial, it is not enough to say that he is not interested in the particular question put.

HOULDSWORTH

v.  
WALKER.

After calling another witness, Mr Jeffrey stated, that the pursuer was willing to refer the whole case. A minute of reference was accordingly signed by the parties, and an order made, that the Jury should be discharged without returning a verdict.

*Jeffrey, Cockburn, and J. S. More, for the Pursuer.*

*J. A. Murray, Grant, and Robinson, for the Defender.*

*(Agents, William Ellis, and Carnegy and Neilson.)*

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Some of the books in this case had been produced by the pursuer, sealed up. Before the trial, Mr Grant moved that the defender should be allowed inspection of them, to which Mr Jeffrey objected, but stated that

A general order for inspection of the books of a mercantile company refused.

HOULDSWORTH

v.  
WALKER.

he had no objection to allow the Clerk of Court to look into them.

**LORD CHIEF COMMISSIONER.**—It is extremely important that there should be a selection of such books as are necessary ; but it is not usual for the Court to make a general order for inspection of the books of a great mercantile company, by the opposite party. We cannot make any as to the books which are sealed up. The proposal made to submit them to the Clerk is very proper. The whole ought to be in his hands.

**LORD PITMILLY.**—I hope that, in addition, there will be some admissions made, as I never saw a case where that was more necessary for the ends of justice. Without this, the case must go as a *mare magnum* to the Jury.

On the 22d February a motion was made to have the books, &c. delivered up.

**LORD GILLIES.**—I never understood that the books were produced here ; but if they were, then I grant the order to deliver them up, and to return the process to the Court of

Session. I can grant no order for producing them to the arbiter.

HOULDSWORTH  
v.  
WALKER.

PRESENT,

LORD CHIEF COMMISSIONER.

### CLARK v. CALLENDER.

1819.  
February 1.

AN action to compel implement of an alleged agreement; and for damages.

A finding for a defender, as the pursuer adduced no legal evidence.

DEFENCE.—A denial of the agreement. Writing was essential to such an agreement.

### ISSUES.

“ Whether the defender did, in or about  
“ the month of February 1806, enter into  
“ an agreement with the pursuer, to relieve  
“ him, the said pursuer, from, and take upon  
“ himself, the said defender, a certain bargain  
“ set forth in the summons, bearing date the  
“ 8th day of December 1805, between Mr  
“ George Aitken of Cupar in Fife, and  
“ others, and Mr James Gibson, writer to  
“ the signet, respecting wheat, or the price

CLARK  
v.  
CALLENDER.  


“ of wheat ; from which bargain the said pursuer had, before the said month of February, relieved the said Mr George Aitken ?

“ Whether the defender did not, at the same time, agree to pay the sum of L.40 sterling, to the said pursuer, or to the said George Aitken, on condition of the bargain being made over to him the defender ?”

Mr Aitken and others agreed to deliver to Mr Gibson, 1000 bolls of wheat each year, for 10 years, for which Mr Gibson was to pay 30s. per boll, or the difference between that and the highest Fife fiars, if the fiars were below 30s. Clark the pursuer had agreed to relieve Aitken of his part of the agreement, and to pay him the sum of L.40. The present action was brought, on an allegation that the defender had agreed to relieve the pursuer of this obligation to Aitken.

Parol evidence  
of an agree-  
ment received.

The case came originally for trial, on the 16th July 1818. An objection was then taken, that it was incompetent to prove an agreement of this nature by parol evidence. The objection was overruled, and the evidence admitted, on the ground that, if the evidence of the agreement could only rest upon a written document, the Court of Session



would not have sent the case to be tried by a Jury, but would have decided it, either upon the view of the document, if there was one, or upon the insufficiency of the bargain for want of writing.

CLARK  
v.  
CALLENDER.

An application being made for a new trial, because the parol evidence was improperly admitted, it was resisted, on the ground of an implied, if not a direct finding, by the Court of Session, that writing was not essential. The Court of Session, however, set aside the verdict, and granted a new trial, on the ground that the parol evidence should have been rejected.

When the first witness was called on the second trial.

Parol evidence  
of an agree-  
ment rejected.

*Cockburn*, for the defender.—We formerly objected to parol evidence in this case, and do so again, upon the same grounds. The Court, in granting the new trial, were unanimously of opinion that it is incompetent.

*Jeffrey*.—I do not deny that the Judges were ultimately of opinion that parol evidence was incompetent. But I am entitled to a decision of the point here, to enable me to bring it under review.

1st, I hold it *res judicata* that parol evi-

CLARK  
v.  
CALLENDER.

dence is competent. The question of its competency was discussed in written pleadings before the Lord Ordinary, and with these before him, the Issues were directed.

2d, A contract for the sale of moveables, may be proved by parol.

**LORD CHIEF COMMISSIONER.**—This application appears to be for the purpose of putting the question in shape for more solemn discussion. I shall therefore state the reason why I reject the evidence now, which I admitted formerly.

The case originally came here, as stated by the pursuer, after the question had undergone full consideration before the Lord Ordinary. The Court here, thinking the Court of Session must have had good reasons for sending the Issue, and that there might be circumstances which took the case out of the rule of law, by which writing is required to prove such an agreement, admitted the parol evidence. The case went back under peculiar circumstances. The motion for a new trial did not rest merely on the statement of counsel, but also on a note by this Court, reserving the present question.

It is unnecessary to state the manner in

CLARK  
v.  
CALLENDER.

which the case might have been brought before the Court of Session. It was brought before that Court on a motion for a new trial; and it is returned by an interlocutor granting the new trial, in a perfectly general form; but though the order is general, there is clear evidence that the note of the former trial was under consideration of the Court; and they have granted the trial, on the ground that the parol evidence was improperly admitted.

I cannot enter here into a discussion of what I may think the law is; for in this case, from what passed in the Court of Session, and knowing the grounds of that Court's decision, I find it incompetent now to receive the evidence tendered.

His Lordship then stated to the Jury, that as the pursuer had brought no legal evidence, they would of course find for the defender.

**" Verdict for the defender on both Issues."**

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*Jeffrey for the Pursuer.*

*Cockburn for the Defender.*

(Agents, *Macritchie and Murray*, w. s. and *John Kerr*, w. s.)

CLARK  
v.  
CALLENDER:



The question of the competency of parol evidence was again carried to the Court of Session, on a Bill of Exceptions; and on the 9th March 1819, that Court disallowed the exception, on the ground that the pursuer merely repeated, at the second trial, his offer of the same sort of parol evidence which had been tendered and received on the first trial; and that it had no reference to a proof of homologation, and that there was no *rei intervenus*.

The case was then appealed to the House of Lords; and on the 16th June 1819, the appeal was dismissed, and the interlocutors affirmed, with L.80 costs. It is understood that the Lord Chancellor, in the course of the argument at the Bar, at first expressed a doubt, whether the Bill of Exceptions sufficiently specified the evidence tendered; and stated, that a Bill of Exceptions ought to state what the evidence was which was tendered, as well as the nature of it: That it was not enough to say that the party was ready to call witnesses to prove his case; but that the Bill of Exceptions ought also to state the facts he was ready to prove.

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PRESENT,

LORD PITMILLY.

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BURNS, &c.  
v.  
STIRLING, &c.

BURNS, &c. v. STIRLING, &c.

1819.  
March 1.

REDUCTION of a decree in the Admiralty Court.

An injury to one vessel found to have been occasioned by carelessness of the master and crew of another.

DEFENCE.—The injury was occasioned by the carelessness of the crew of the vessel belonging to the pursuers.

ISSUE.

“ Whether the damage sustained by the  
 “ ship Two Sisters, and cargo on board of  
 “ said ship, in consequence of being run  
 “ foul of by the sloop Christian, the pro-  
 “ perty of the pursuers, in the harbour of  
 “ Ely, upon the 17th day of November  
 “ 1814, or about that time, was occasioned  
 “ by the ignorance, carelessness, or inatten-  
 “ tion of the master or crew of the said ship  
 “ Christian? Or whether the collision be-  
 “ twixt the said two vessels, and consequent

BURNS, &c.  
STIRLING, &c.

“ damage to the said ship Two Sisters, and  
“ cargo, was occasioned by the ignorance or  
“ carelessness of the master and crew of the  
“ ship Two Sisters ?

“ Damages laid at L.200.”

In a storm in November 1814, the Two Sisters ran into Ely harbour, two hours after high water, and soon took the ground. The sloop Christian, a larger vessel, entered soon after, and also took the ground. At low water the master of the Two Sisters employed his crew, and other hands, to carry out one anchor as far as they could into the sea, and another towards the pier. The master of the Christian went to Kirkaldy, it was said, for the purpose of getting from the owners a new anchor, in place of one he lost during the storm, and left his vessel in charge of the crew, and some fishermen, who act as pilots at Ely. The fishermen went on shore at low water, and promised to return when the tide flowed, if it was then possible ; but the storm increasing, they did not return, but came to the pier, and made a signal to the crew to drop their anchor. This was accordingly done; but before the vessel had sufficient length of cable, she struck the Two Sisters repeatedly, and

stove in her planks, which rendered it necessary for the master to cut her cables, and allow her to drift on the shore. Burns, &c.  
v.  
Stirling, &c.

The witnesses differed as to whether the *Two Sisters* was afloat before the collision.

*Cockburn*, for the defender, stated, that it was sufficient if he could shew that the damage was not done by the *Christian*. It was occasioned by the *Two Sisters*, as she, being the smaller vessel, ought to have cut or slackened her cables. The *Christian* was in better hands than if the master had been on board. If there was no blame on either side, then we are entitled to have a verdict, finding the facts.

*Jeffrey*, in opening the case, and in reply, contended, that the crew of the *Christian* did not take the necessary precautions at low water: That, had the cables of the *Two Sisters* been cut, the insurance might have been lost: That when all the blame is on one side, reparation is due.—*Woodrop-Sims*, 21st November 1815. 2. *Dodson*, 83: and 2. *Dodson*, 83. that the only witnesses the pursuers had brought were the crew of the *Christian*, to swear that they were not negligent.

BURNS, &c.  
v.  
STIRLING, &c.

**LORD PITMILLY.**—This resolves into a simple question of fact, whether the loss was occasioned by the negligence of the crew of the one vessel or of the other; and we have nothing to do with the amount of the injury.

As you have paid so much attention to the evidence, and as it is so clear, I shall not go over it in detail, but would beg of you to distinguish it into two periods.

It is clear, that in coming into harbour, it is the duty of mariners to provide for their own safety, and that of others, and not to wait till the moment of danger. With this view, you will look anxiously and carefully; first to the proof of the precautions taken by the masters of both vessels, from the time of their coming into harbour, till the next tide; and then, the evidence applicable to the facts, at the moment of danger; which, however, is not so important as the first period.

During the first period, the crew of the *Two Sisters* carry out their anchors, &c.

The master of the *Christian*, on the other hand, leaves his vessel, which, in my opinion, was very blameable. The next question is, what the crew ought to have done; whether to carry out anchors, or a rope to the pier; and as there is contradictory evidence on this



subject, I shall state it to you. [His Lordship then stated the evidence.]

BURNS, &c.  
v.  
STIRLING, &c.

There were eight or nine witnesses who swore that a rope might have been sent to the pier; but in opposition to this, there is strong evidence for the defenders.

A question of law may occur, whether, if either party was negligent at the first part of the day, the liability in damages will be affected by the negligence of the other, at a subsequent period. It is not necessary to go into much legal discussion: I shall only say, that if one party makes every preparation against the approaching danger, it will not be sufficient to prove, that in the moment of danger, he did not make use of every means that may appear proper to a cool spectator. To subject him, there must be proof of gross negligence, and that he acted in a manner in which a man of ordinary prudence would not have acted at the moment of danger. It is not sufficient that you are uncertain whether a different conduct at that moment might not have led to a different result. If you have doubts, then you must go back and consider the precautions used, before the time of danger.

There is contradictory evidence as to

BURNS, &c.  
v.  
STIRLING, &c.

whether it was the duty of the master of the Two Sisters to slacken his cables ; but the remarks that have been made as to the credit due to the different sets of witnesses, in matters of professional opinion, apply here. The *facts* are not to be questioned, but their *opinion* may be biassed.

If you think there were faults on both sides, then you may return the facts that have been proved ; but I have little doubt that you will not find this necessary.

Verdict—" That the damage sustained by  
" the ship Two Sisters and cargo, was occa-  
" sioned by the carelessness or inattention of  
" the master and crew of the ship Christian."

*Jeffrey, Jamieson, and Henderson, for the Pursuers.*

*G. J. Bell and Cockburn for the Defenders.*

*(Agents, James Gillon, Alexander Forsyth, and George M'Dougall.)*

PRESENT,  
LORD GILLIES.

SMITH v. JAMIESONS.

1819.  
March 10.

Damages for  
breach of con-  
tract.

AN action of damages for breach of contract.

**DEFENCE.**—The bargain was not concluded.

SMITH  
v.  
JAMIESON.  


**ISSUE.**

“ Whether, in the month of September  
“ 1817, and subsequent to the 5th day of the  
“ said month, the defenders, or one or other  
“ of them, purchased from Mr Archibald  
“ MacBrair of Glasgow, as agent for the pur-  
“ suer, 200 bolls of oats, conform to a sample,  
“ at 27s. per boll, Stirling measure, deliver-  
“ able at Port-Dundas or Kirkintilloch ; and  
“ whether the said defenders failed to imple-  
“ ment the said bargain, to the loss and da-  
“ mage of the said pursuer ?”

In September 1817, Liddle, an agent in Leith, transmitted, at the desire of the pursuer, a sample of his oats to MacBrair in Glasgow, who wrote to the defenders, mentioning that he had got the sample, and wished them to see it. Accordingly, one of them met him, and after seeing the sample, agreed to take 200 bolls at 27s. per boll ; but when the oats were sent, they refused to receive them, alleging that MacBrair was in a mistake, that they had not got his letter at the

SMITH  
v.  
JAMIESON'S.

time they met, and that it was a different bargain of which they understood him to speak at the time they met in Glasgow. The oats were afterwards sold at a loss, and this action was brought to recover the balance of the price, and damages.

A mercantile agent an admissible witness, though entitled to commission.

When MacBrair was called as a witness, *Miller*, for the defenders, objected. He is not a regular broker, and as he is paid so much per cent. his interest is direct.

*Cockburn*, for the pursuer.—He has no interest in the event of this trial, as we have paid his commission, and are ready to relieve him from any claim for not having completed the bargain.

LORD GILLIES.—Call the witness to ascertain the fact; but at present I am disposed at any rate to repel the objection on the ground of interest. An analogous case is that of a banker's clerks, who are good witnesses to prove due notification of the dishonour of a bill, though, if they did not send the letter, they are liable.

The witness stated that he had been paid commission on the highest price (27s.), and of course he had no interest.

When Mr Jeffrey closed his speech for the defender, LORD GILLIES observed, that it would be necessary to call back MacBrair, who had been re-inclosed, as the notes he had taken of the evidence differed from the statement by Mr Jeffrey. The witness was accordingly called; and his Lordship's notes being read to him, he stated that they were correct.

SMITH  
v.  
JAMIESONS.

A witness, examined and re-inclosed, called again to ascertain whether the note of his evidence was correct.

A witness for the defenders having stated, that, on the day the defender was alleged to have made the bargain, he saw him at Cumbernauld, he was then asked where the defender said he was going.

His Lordship at first seemed disposed to allow the question; but it being farther objected that it was not the best evidence,

LORD GILLIES.—This is not the best evidence, and therefore incompetent. If, however, the objection was simply that it was not the best evidence, in the circumstances in which this question arises, I might get over the objection; but it is coupled with this, in addition, that the statement comes from the defender.

Jeffrey.—The whole case rests on the testimony of one witness, which is not evidence; and he has mistaken one bargain for another.

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v.  
JAMIESONS.

**LORD GILLIES.**—This appears to me a very simple case. The damages are admitted, and the only question is, whether there was a bargain. This is said to depend on the testimony of one witness; but the rule as to one witness is, that if he is supported by circumstances, and you believe him, the evidence is complete.

One witness  
supported by  
circumstances,  
sufficient evi-  
dence.

The question for me to decide is, whether the circumstances are sufficient in this case to render this testimony evidence; and I state to you, that if you believe the witness, you must give full effect to his testimony as legal evidence. The circumstances appear to me extremely strong, and that the testimony is to be believed; indeed, it is impossible to suppose perjury in the case, and there is no alternative between perjury and giving faith to the testimony.

The written evidence shews that there was a bargain, and that it was varied as to payment and place of delivery. It is said he did not conduct himself as an agent ought to do, in not giving the defender notice in *writing*, that the bargain was confirmed by his employers. You are better able to judge of this; but to me it appears, that he conducted himself correctly in every particular. He pro-

bably expected to see the defender, and there are important verbal engagements entered into every day.

SMITH  
v.  
JAMIESONS.  
—

Verdict “ for the pursuer, damages  
“ L.158. 12s. 2d., due from 25th September  
“ 1817.”

*Cockburn and D. Macfarlane, for the Pursuer.*

*Jeffrey and Ja. Miller, Jun. for the Defenders.*

(Agents, *David Murray, w. s. and A. Robertson, w. s.*)

—

PRESENT,  
LORD PITMILLY.

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## DUKE OF ARGYLE v. CAMPBELL.

1819.  
March 12.  
—

COUNTER actions relative to the right of the Duke of Argyle to take sea-wreck and shell-sand from the shore opposite to the lands of the defender.

A finding as to the practice of taking wreck, &c. from the sea shore.

### ISSUES.

“ 1st, Whether the Duke of Argyle, by  
“ himself or his tenants, has been in the im-  
“ memorial use of taking sea-ware, or wreck,

D. OF ARGYLE

v.  
CAMPBELL.

“ or shell-sand, for the use of his lands, from  
 “ the shores of Machrichanish bay, and from  
 “ those parts of the shores immediately ad-  
 “ joining to the lands of Ballevain, Drumlea,  
 “ and others, the property of the said Frede-  
 “ rick William Campbell of Barbreck, Esq,  
 “ 2d, Whether such use of taking sea-  
 “ ware, or wreck, or shell-sand, if any, upon  
 “ the part of the Duke of Argyle, or his te-  
 “ nants, was with the leave or tolerance of  
 “ the said Frederick William Campbell, or  
 “ his predecessors, or tenants, in the foresaid  
 “ lands.”

Mr Campbell had presented an application to the Sheriff, to interdict the tenants of the Duke from taking wreck and shell-sand from the sea shore opposite to his lands. The Duke declined the jurisdiction of the Sheriff, in a question of heritable rights, and in a maritime case. The objection was sustained; and the case having been carried to the Court of Session by advocacy, the Duke brought a declarator to have his right ascertained.

A tenant who has never taken wreck, an admissible witness to prove the practice by others.

It was stated as an objection to the first witness, that being one of the Duke's tenants, he was interested. In his examination in



*initialibus*, the witness stated, that he never had taken sand from the place in question.

D. OF ARGYLE  
v.  
CAMPBELL.

*Jeffrey*, for the defender.—The claim is for the whole barony ; and if the Duke is found to have the right, this witness, and all the other tenants, may take it.

LORD PITMILLY.—I shall admit the witness, as I do not think the interest has been made out.

The same objection was taken to another witness. In his examination *in initialibus*, he stated, that when in bad health, he gave up his farm to his son, but admitted that he still considered himself tenant. He was then asked, if he ever had taken sand from the place in question ; and he answered that he had taken wreck and sand.

A tenant who has taken wreck, inadmissible as a witness.

LORD PITMILLY.—It appears to me that this is not an admissible witness ; and the evidence given by him, as to taking sand, &c. so far as it goes to establish the pursuer's case, cannot be taken into consideration by the Jury.

When the defender afterwards called one of his tenants, the same objection was taken.

The smallest interest excludes a witness.

*Jeffrey*.—Our tenants are necessary wit-

D. OF ARGYLE

v.  
CAMPBELL.

nesses, as they all possess on old leases ; and as their right to take sand, &c. is admitted, they have not the same degree of interest, as those on the other side.

*Clerk.*—There is no ground for any distinction. If the objection was good in the former case, the amount of the interest is nothing. They are not necessary witnesses, as every servant must know the facts.

**LORD PITMILLY.**—The objection of interest is almost the only one that is an absolute exclusion of a witness. The smallest interest excludes as effectually as the greatest, because the Court cannot distinguish what degree of interest will influence the mind of any particular individual.

I see no room for distinguishing the cases. The tenants on both sides, who take sand, are interested, and I must repeat the same judgment.

A witness examined, whose name was not in the first list served on the opposite party.

An objection was taken to a witness, that his name was not in the list.

*Jeffrey.*—It is in the discretion of the Court to allow the witness to be examined. Notice was given two days ago, and his name was not left out of the original list, from any negligence or improper motive.

*Clerk.*—They have not examined a single witness, and are not now entitled to this, as they ought to have asked it at the beginning of the trial.

D. OF ARGYLE  
v.  
CAMPBELL.  


LORD PITMILLY.—This is entirely in the discretion of the Court; and I shall receive this witness, as I would have received the witness on the other side, if an equally strong case had been made out.

When there is no surprise, and no attempt at any thing improper, I think it my duty to the Jury, and in forwarding the ends of justice, to admit the witness, and that I am not merely entitled, but bound to receive him.

The witness at one time had had the management of the defender's property, and was desired to look at some leases granted during that period.

An objection to a written document ought to be stated at the time it is tendered in evidence.

*Clerk.*—This is incompetent: the leases are not evidence.

*Jeffrey.*—The objection is too late.

LORD PITMILLY.—In my opinion, the objection ought to have been stated when the leases were produced.

Before his reply, Mr Clerk wished part of the leases read.

D. OF ARGYLE

CAMPBELL.

LORD PITMILLY.—They were produced by the defender, and I think you are entitled to read them.

*Moncreiff* opened the case, and contended, that the Duke of Argyle being infeft in the barony of Kintyre, he has the right to the whole coast; or, if that is not sufficient, he has the right in virtue of his commission as Admiral. The defender has no title, as he got no right to the wreck, &c. within high-water mark.

To support his plea, the defender must aver an exclusive possession; but all we maintain is, that there has been a joint possession.

*Jeffrey*.—This is a simple question of fact, and the detail of law was artfully given to perplex, if not mislead. We deny the accuracy of the statement, and deny that our land has been part of the barony for a century past, at which time the whole right which the Argyle family had to the lands was conveyed to us.

The question is, whether the Duke has had *immemorial* possession, and such possession as will deprive the defender of a right that would otherwise belong to him.

**LORD PITMILLY.**—Never since the institution of this Court have I seen a case of purer fact than the present. In the Court of Session there is a dispute as to the titles of the parties, which may be affected by the state of possession; and the question as to possession is sent here to have the fact ascertained. It will then return to the Court of Session; and having the titles, together with the verdict on the facts, before them, they will take a complex view of the whole case. The only questions here are, whether the Duke has had a common possession? and if he had, whether it was by permission from the defender? Of the possession by the defender there is no question.

D. OF ARGYLE

v.  
CAMPBELL.

The question under the first Issue is, whether the Duke has possessed for 40 years or upwards. The evidence is not discordant; and you have to say whether the whole does not tend to the conclusion, that in terms of the Issue, the Duke had, &c.

If you are satisfied that he had possession, then you must say whether it was by leave from the defender. This is a proposition which the defender must prove; the Duke is not bound to prove a negative. There is no direct evidence on this point; and the former factor

D. OF ARGYLE  
v.  
CAMPBELL.

of the defender proves, that he at least never gave permission. The only evidence consists of the attempt to prove interruptions. But the interruptions appear to have been on account of the hour at which the Duke's tenants came; and the regulations made by the tenants as to the manner of taking the seaware, &c. rather confirm than weaken the usage of taking it.

“ Verdict for the pursuer on both Issues.”

*Clerk, Moncreiff, and Fletcher, for the Pursuer.  
Jeffrey and Cockburn for the Defender.*

(Agents, J. and M. Ferrier, and Lockhart and Kennedy.)

==  
PRESENT,  
LORD GILLIES.  
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1819.  
March 13.

SCOUGAL v. LADY MARY L. CRAWFORD.

Damages  
against a pro-  
prietor, for ta-  
king the roof  
off the house  
of a servant.

AN action of damages for taking part of the roof off a house possessed by the pursuer.

DEFENCE.—The house belongs to the de-

fender, who wished to repair the roof; and the pursuer would not quit possession.

SCOUAL  
v.  
LADY MARY  
L. CRAWFORD.

ISSUE.

“ Whether, betwixt the hours of twelve  
“ and one o’clock of the morning of the 19th  
“ November 1816, or about that time, a  
“ number of persons, at the instigation, or  
“ acting under the orders, or by the authori-  
“ ty of the defender, did proceed to a dwel-  
“ ling-house called Crawford Priory Cottage,  
“ then in the occupation of, and inhabited  
“ by, the pursuer and his family; and did  
“ then and there, under cloud of night, vio-  
“ lently proceed to barricade one or both of  
“ the doors of the said house, and to tear off  
“ and throw the thatch from the roof of the  
“ said house; or did commit other acts of vio-  
“ lence, to the great alarm and damage of  
“ the said pursuer and his family.

“ Damages claimed, as restricted by the  
“ pursuer, to L.1000.”

*Cockburn*, for the pursuer.—This is a simple, and in some respects an absurd case, though it was one of a very serious nature. The pursuer was engaged for a period of

SCOTLAND  
v.  
LADY MARY  
LE CHAWFORD.

years as a servant to the defender, and was to have a suitable house. He was, under this agreement, put in possession of a house; and, without providing another that was suitable, the defender sent and caused the roof to be taken off. In these circumstances he is entitled to damages for the insult, as well as the injury.

*Jeffrey*, for the defender.—We maintain that the defender was entitled to take off the roof, but deny all violence or outrage. It was by a personal contract he got possession of this house; and being servant to the defender, she was entitled to turn him out when she pleased. The method of doing it was rendered necessary by his refusal to leave the house. The action of removing was unnecessary, as this was not a lease.

LORD GILLIES.—In every case of this sort, there are two questions.—1st, Whether damages are due; 2d, The amount.

In many cases the Jury are the proper judges of the whole case. But when a plea in justification is stated, it becomes the duty of the Court to dispose of it. In the present case, it appears to me that it would have been




as well if the defender had not attempted to justify, as I am clearly of opinion that she acted illegally, and that the pursuer having suffered, he is entitled to damages.

SCOTCH.  
LADY MARY  
L. CRAWFORD.

In this country, a person is entitled to repel aggression; and if any one forces his way into my house, I am entitled to turn him out. The counsel for the defender says, this house belonged to the defender, and as the pursuer refused to leave it, he is to be held in the situation of a person who forced his way into it. This, in my opinion, is an erroneous view of the case. The house belongs in property to the defender, but the pursuer was in the legal possession of it, and it was therefore his castle.

His title was a personal contract, by which he was to have a suitable house, garden, &c. If the defender had refused to implement this contract, the pursuer must have brought his action; but she did implement it, and the pursuer being put in possession, his right was completed, and was as effectual as by any lease. But he was bound to remove; not, however, at the will of the defender, but of the law; and he had a clear and indisputable right to keep possession, till a house was provided, such as the Judge, and not the defender,

SCOUGAL  
v.  
LADY MARY  
L. CRAWFORD.



thought suitable. In my opinion, the action of removing was a *proper* one; and in that action it was found that the house provided in Cupar was not suitable.

It is said there is something ludicrous in this case; and this is true; but the conduct of the defender might have led to very serious consequences; as, if the pursuer had resisted, and death ensued, I am bound to say, he would have been justified in the sight of God and man.

There was more blame on the part of the defender than injury done to the pursuer; but as this is not a prosecution at the instance of the public prosecutor, we are not entitled to consider the degree of blame which attaches to her, but merely the extent of his suffering, which happily was not very considerable.

**Verdict for the pursuer—damages L.250.**

*Cockburn and H. Drummond, for the Pursuer.*

*Jeffrey and Hope, for the Defender.*

*(Agents, Alexander Goldie, w. s. and George Lyon, w. s.)*

HIDDLESTON  
v.  
GOLDIE, &c.

DUMFRIES.

PRESENT,

LORD PITHEILLY.

HIDDLESTON v. GOLDIE, &c. (HIDDLE-  
STON'S TRUSTEES).

1819.  
April 12.

AN action of reduction on the ground of  
death-bed.

Found that a  
person died of  
the disease of  
which he was  
ill at the time  
of executing a  
trust-deed.

DEFENCE.—The granter, at the date of  
the disposition, was not labouring under the  
disease of which he died.

### ISSUES.

“ 1<sup>st</sup>, Whether the deceased John Hiddle-  
“ ston, the granter of the trust-disposition  
“ under reduction, died on or about the 11th  
“ June 1818?

“ 2<sup>d</sup>, Whether on the 29th May 1818, the  
“ date of the said trust-disposition, the said  
“ John Hiddleston was labouring under the  
“ disease of which he afterwards died; and whe-

HIDDLESTON

GOLDIE, &amp;c.



“ ther, subsequent to the date of the said trust-  
 “ deed, the said John Hiddleston went to  
 “ kirk and market ?”

Medical gentlemen called to give an opinion on the nature of a disease, allowed to be in Court during the examination of witnesses as to the symptoms of the disease.

See Vol. I. p. 308.

After the case was opened for the pursuer,

*Cockburn*, for the defenders, stated.—This case must depend on the opinion of medical gentlemen ; and it is important that those who did not see the deceased, should hear the evidence of the other witnesses. This has been done twice in this Court ; once in a case of insurance.

*Jeffrey*, for the pursuer.—I should have no objection to the arrangement proposed, if it had been made in time ; nor shall I now oppose it, if our witnesses can be found, and also be present at the examination. This is a medical question, and it is important that they should hear the evidence ; but those who saw the deceased during part of his illness, are equally entitled to this benefit ; but, of course, the duty of the witnesses will be explained to them by the Court.

When the witnesses were called,

LORD PITMILLY.—You are called here, that you may have an opportunity of hearing the evidence of the less instructed witnesses, that from the symptoms they describe, you may be able to give an opinion upon the nature of the disease. It is not for the purpose of giving a joint opinion; and therefore each ought to form his individual opinion on the facts stated, without communicating with the others, that you may be able to give that opinion when afterwards called and examined separately.

HUBBARDSON

v.  
GOLDIE, &c.

The first medical gentleman called had attended the deceased during a considerable part of his illness.

When the second was called,

*Cockburn*, for the pursuer, wished him to be put in possession of the *facts* stated by the first.

The facts, but not the opinion stated by one doctor, detailed to another.

LORD PITMILLY.—It appears to me, that the best course is for Mr Cockburn to read his notes of the evidence, under correction of any mistake.

Which was done accordingly.

*Jeffrey*.—You are called to apply a law

**HIDDLESTON** which meets with less approbation from the  
**GOLDIE, &c.** profession, or support from common sense, than  
 any other. It is, however, the law, but you are bound to give it the narrowest possible construction, and to favour the defender.

The question is one of medicine rather than law. The pursuer has not proved that Hiddleston died of the same disease, and we shall prove that he died of a different disease.

**Cockburn.**—The question, and the only question, is, without reference to the medical name of the diseases, whether this person died of the same disease.

Stair, III. 4.  
 28. p. 463. 1—  
 Ersk. III. 8.  
 98. p. 689.

As the law is admitted, we are only bound to prove that he was ill in May, and that he died in June. It is of no consequence that the disease may have assumed a new form. The question is, whether this, in fairness, is a new disease. We proved that he was ill, and gradually sunk under the disease. In opposition to this, it is said, he was struck dead by apoplexy. The medical gentleman who states this, is certainly highly respectable, but he is a single witness, and contradicted, instead of being supported, by circumstances.

**LORD PITMILLY.**—This is in some respects a nice and difficult case.

HIDDLESTON  
v.  
GOLDIE, &c.

A great deal has been said on the law of death-bed, and that it did not meet with the admiration of gentlemen of the profession, and therefore you must favour the defender. These, however, are principles on which you ought not to act. The only question for you, is the point of fact, whether John Hiddleston was, at the date of the trust-disposition, labouring under the disease of which he afterwards died.

The only part of the law which it is necessary for us to know, is what is meant by the same disease. Law holds, that any disease followed with death within sixty days, is the disease of which a man dies. It is of no consequence that it may have a different name, or that the person may have been of sound mind, or going about his ordinary affairs. If he had a disease upon him, and death followed, this, in contemplation of the law, is the disease of which he died. In this case, there is no doubt the person was ill at the date of the deed.

The evidence is of two kinds; 1st, That of the attendants and medical gentlemen who

HIDDLESTON  
<sup>v.</sup>  
GOLDIE, &c.

visited him; 2d, The opinion of medical gentlemen on the facts proved.

Both are legal evidence, and must be attended to; but as, in my opinion, this case must rest on the opinion of the medical gentlemen, it is not necessary to say much on the other evidence, though it may be of use in correcting the medical evidence.

[His Lordship then stated the evidence for the pursuer.]

We are not to consider ourselves as doctors, or to form our own opinion of the nature of the disease. It is much safer to take the result of the opinions given, which went to this, that though the symptoms might vary a little, the disease remained the same.

If the case had rested here, there could have been little doubt; but there has been most important evidence given for the defenders, to prove that this person died of a totally different disease; and you must make up your minds on the question of fact, after balancing the evidence.

The defence, in this case, is a very nice one; and I think the burden of proving it rests on the defender. The pursuer has made out his case, and placed it in the situation to entitle him to a verdict, if the defender does



not prove clearly and distinctly the defence, that Hiddleston died of a different disease.

HIDDLESTON

v.  
GOLDIE, &c.



It is therefore necessary to go through the evidence for the defender, and balance the opposite opinions. Dr Maxwell gives it as his decided opinion, that Hiddleston died of a very different disease; and the symptoms he described, convinced another medical gentleman that Hiddleston died of apoplexy, which they agreed in opinion was not a common consequence of the previous complaint. It does not appear to me that Maxwell's evidence is liable to the objection taken to it, that he is a single witness unsupported; and, therefore, I state this as a case in which the opposite opinions are to be balanced. If the disease, though different, had been a common sequel or result of the other, I would have held, that upon this ground, the defender had failed; but the reverse has been proved. It is not possible then to reconcile the testimony. I shall therefore sum up both sides, and leave it to a respectable Jury to decide between the contradictory opinions.

There can be no difficulty in the form of the verdict: you may either convert the Issue into an affirmative or negative, or find for the pursuer or defender.

HIDDLESTON

GOLDIE, &amp;c.

The verdict was for the pursuer on the different points in the Issues.

*Cockburn, Maitland, and Whigham, for the Pursuer.*  
*Jeffrey and Ivory for the Defender.*

(Agents, *A. Goldie, w. s.* and *Wm. Bell, w. s.*)

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DUMFRIES.

PRESENT,  
 LORD PITMILLY.

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M'LEAN v. SIBBALD.

1819.  
 April 13.

Damages for  
 defamation.

AN action of damages for defamation.

DEFENCE.—No ground for the action.

ISSUES.

“ 1st, Whether, on or about the 9th day  
 “ of June 1816, the defender did *insert*, or  
 “ cause to be *inserted*, in the Book of Records,  
 “ or Minute Book of the Kirk-session of  
 “ Kirkmabreck, a certain paper referred to in  
 “ the summons, defamatory of, and injurious  
 “ to, the pursuer, as the act or minute of the

"Kirk-session of Kirkmabreck, without the  
"authority of the said Kirk-session?"

M'LEAN  
v.  
SIRRAID.

The second Issue was, Whether the defender communicated the contents of the aforesaid writing at sundry times and places to several individuals?

Damages and solatium laid at L.100.

The defender was minister of the parish of Kirkmabreck, and the pursuer one of the elders. Certain differences occurred between them; and the pursuer alleged that the defender got the other elders to sign a certificate, and caused a minute to be inserted in the Kirk-session record, which he considered defamatory.

In this case, a proof had been taken on commission. When one of the witnesses was called, an objection was taken that he had gone with the agent, and had been present at the examination of two witnesses.

A witness rejected, having gone with the agent, and been present at the examination of other witnesses.

LORD PITMILLY.—It is impossible for me to receive the witness.

When the deposition of one of the witnesses who was dead was produced,

M'LEAN  
v.  
SIBBALD.

*Jeffrey*, for the defender, objected.—Evidence of what a dead man has said, is only competent after the better evidence is exhausted; and there are two members of Session not yet called. This proof was *ex parte*, as there was no condescendence, or any intimation that the proof was going on.

*Cockburn*, for the pursuer.—The defender declined the jurisdiction of the Court, and did not attend. The objection rests on the mere fact of his not being present.

LORD PITMILLY.—I am not aware of the rule contended for by the defender, that all the superior evidence must be first exhausted. If this is competent evidence, I cannot interfere to prevent the pursuer producing it at the time he thinks proper.

In my opinion the evidence is admissible, but liable to observation to the Jury. In the Court of Session it was found that this proof was regularly taken, and therefore I am bound to receive it here. When it was said to be *ex parte*, all that was meant was, that no one was present on the part of the defender, to cross-examine the witness. It is therefore defective, and liable to this objection.

When one of the witnesses formerly examined was called, the counsel agreed in opinion, that he was entitled to read his former deposition.

M'LEAN  
v.  
SIBBALD.

A witness examined on commission, allowed to read his deposition before being examined.

Before closing his case, the pursuer gave in the process in the Court of Session.

*Jeffrey.*—The pursuer must close his case.

LORD PITMILLY.—If he wishes to have any passage read from the process, he ought to point it out.

*Jeffrey.*—This is a case not to get reparation for a real injury, but an attempt to gain a victory. If the paper was improperly inserted in the minutes of the Kirk-session, it was done by a regular meeting of the Session; and being an ecclesiastical offence, cannot be corrected in the civil court. The only point of any importance therefore is, whether he fabricated it; and if you find for the pursuer on this, you must then consider whether it is libellous.

*Cockburn.*—We are only anxious for a verdict in vindication of character—not for high damages. We do not accuse the de-

**M'LEAN**  
**v.**  
**SIBBALD.**

fender of forgery, but that he caused this to be inserted without authority.

There is no question here, whether the defender has suffered damage, as he has a separate action.

We wish a verdict as a ground for the Church Court ordering this to be erased.

**LORD PITMILLY.**—At an early stage in this cause in the other Court, I expressed a desire, that it should be settled out of Court. But the parties were entitled to judge for themselves; and our duty now is, to decide it, with reference to the justice of the case—not to which party was right or wrong in continuing the discussion.

The only points in this case are contained in the Issues. There is no question of forgery; it is only whether this paper is injurious, and was inserted without authority.

On the first question you will judge whether you can doubt that the paper is injurious. On the second, whether it was inserted in the minutes, without the authority of the Kirk-session, there is evidence on both sides.

The paper consists of two parts; and you must decide whether the part which appears objectionable, was approved of by the Session.

If you think it injurious, and that it was inserted without the authority of the Session, then the justification flies off.

McLEAN  
vs.  
SIBBALD.  


*2d Issue.*—It appears that the contents of this minute were shewn to several of his brethren, but it was not extensively circulated.

If the defender inserted the minute without authority, it was certainly blameable; but neither party come off well; and we have seen a great deal too much temper in this case.

“ Verdict for the pursuer, damages 1s.”

*Cockburn, Maitland, and Hamilton, for Pursuer.*

*Jeffrey and Ivory for Defender.*

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There was a counter action by the defender in the above case, against the pursuer. It had been agreed that the same Jury should try both cases. No additional evidence was produced in the second case, but it was opened on both sides; and after the reply for the pursuer, Lord Pitmilley shortly stated the case to the Jury, who returned a verdict for the pursuer, damages 1s.

*Jeffrey and Ivory for Pursuer.*

*Cockburn, Maitland, and Hamilton for Defender.*

SELKIRK

v.

RANKIN.

DUMFRIES.

PRESENT,

LORD PITMILLY.

1819.

April 14.

SELKIRK v. RANKIN.

Damages  
claimed by in-  
dividuals,  
members of an  
incorporation,  
for defamatory  
expressions  
said to have  
been used  
against the  
members of  
that incorpo-  
ration.

AN action of damages for defamation.

DEFENCE.—A denial of malice, or of  
having used the expressions, as laid.

ISSUES.

“ 1st, Whether, on the 28th day of Octo-  
“ ber 1814, or about that time, the defender,  
“ when presiding as one of the Bailies of  
“ Dumfries, at the roup of the Flesh-market  
“ dues of that burgh, did publicly, and in the  
“ presence and hearing of a number of his  
“ Majesty’s subjects, there and then as-  
“ sembled, falsely and injuriously declare,  
“ that the said town had been swindled out  
“ of their rents and dues for several years,  
“ or did use words to that effect; and whe-  
“ ther, on said occasion, the said defender



“meant, or did declare that he meant, the  
“words aforesaid to apply to the incorpora-  
“tion of fleshers, or individual members  
“thereof, frequenting said market, to the in-  
“jury and damage of the said pursuer, he  
“being a member of said incorporation, and  
“frequenting said market?”

SELYRE  
v.  
RANKIN.



“2d, Whether, on said occasion, the de-  
“fender did falsely and injuriously say, that  
“the said incorporation, or individuals there-  
“of, frequenting said market, were a set of  
“swindling rascals, or did use words to that  
“effect, to the injury and damage of the said  
“pursuer, he being a member of said incor-  
“poration, and frequenting said market?”

“Damages laid at L.1000.”

*Jeffrey*, for the defender, said, it is diffi-  
cult to speak seriously of this case. The pur-  
suer has not proved his case; and even if he  
had, you might find for the defender.

LORD PITMILLY left the case to the Jury,  
as too clear to require going over the evi-  
dence, or saying any thing upon it.

“Verdict for the defender.”

*Cockburn* and *Whighan* for the Pursuer.

*Jeffrey* and *Maitland* for the Defender.

BELL  
v.  
BELL.

~~SCOTLAND~~  
DUMFRIES.

PRESENT,  
LORD PITMILLY.

1819.  
April 14.

BELL v. BELL.

Illegitimacy  
found not  
proven.

REDUCTION of the service of a daughter as heiress to her father, on the ground that the inquest had not sufficient evidence of the marriage of the father, or the legitimacy of the daughter.

ISSUE.

“ Whether the defender, Janet or Jessie  
“ Bell, is the legitimate daughter of the de-  
“ ceased William Bell, of the island of St  
“ Kitts ?”

An objection was stated to the competency of a witness, that he was married to the niece of the pursuer ; but the objection was not insisted on.

The niece of a  
pursuer received  
as a witness.

When the next witness was called,

*Jeffrey* objected.—She is the niece of the pursuer. In the case of secret facts, relations are admissible; but this is an attempt to prove general repute, where relations are not even the best witnesses.

BELL  
v.  
BELL.  
~~~~~

Cockburn.—We may ask these near relations whether the defender was not introduced to them as an illegitimate child; and if so, it is of no consequence though all the world believed her legitimate.

Jeffrey.—If a person is in possession of a *status*, the declaration of one parent will not deprive him of it, especially when that declaration is attempted to be proved by those who are disputing the right to the property.

LORD PITMILLY suggested, that the other evidence should be first called. After several other witnesses were examined, the niece was again called, to prove the general repute and declarations among the connections of the family.

LORD PITMILLY.—This is a very delicate question; but of late, there has been a relaxation of the rule as to calling near relations. So far as the evidence relates to what took place in the family, I think it ought to be received; but I hope the examination

BELL
v.
BELL.
~~~~~

will be confined to what took place in the family, otherwise I must stop it.

To this decision a Bill of Exceptions was tendered, which Lord Pitmilly stated to be proper, as the question ought to be decided by the Court.

The sister of a pursuer received as a witness.

The sister to the pursuer was next called. Mr Jeffrey again took the objection.

LORD PITMILLY.—This falls under the same rule. I can make no distinction between a niece and a sister.

A person who merely resided in the West Indies, an incompetent witness to prove the law of a particular colony.

It was alleged that the mother of the defender was a mulatto; and a witness who had been 14 years in the West Indies, and had been for a few days at St Kitts, being asked, whether, in that island, an European could legally marry a woman of colour; an objection was taken to the question.

LORD PITMILLY.—You cannot prove the law by this witness.

A deposition formerly taken on the same facts, ought to be read to a witness before he is examined.

The first witness for the defender having stated, that he gave evidence before the inquest at the service of the defender, and that what he then swore was true, it was proposed to read his evidence.

*Cockburn* objects.

**LORD PITMILLY.**—So far from thinking it incompetent, it appears to me, that this deposition ought to have been read to him before his examination.

BELL  
v.  
BELL.  
~~~~~

Maitland, for the pursuer.—We shall prove that the defender was brought home by her father, and introduced to his relations as a natural child;—that her mother was a woman of colour;—and that there cannot be a legal marriage between a European and a woman of colour.

Jeffrey, for the defender.—Her father brought the defender home, and she was received and treated as his daughter, till lately. The pursuer has not proved his case; but I shall strengthen the case of the defender, by proving the general repute that she was legitimate.

The prejudice may be strong against marrying a woman of colour, but there is no law against it.

Cockburn.—This is a simple question of evidence; and as there was no opposition at the service, you must decide as if you were the original Jury. Here there is conflicting evidence, but the preponderance is for the pursuer.

BELL

v.
BELL.

LORD PITMILLY.—The defender is in possession of the *status* of legitimacy. The pursuer brings a reduction of her service, and the averment is, that she is not legitimate.

There is no doubt that the pursuer must make out his case by full, complete, and satisfactory evidence, and that, if he fails, he cannot get a verdict. The defender has nothing to do, unless a *prima facie* case is made out against her.

It is erroneous to suppose that you are in the situation of the original inquest; for the defender having a verdict in her favour, and the pursuer undertaking to prove that she, the defender, is not the lawful child, he must distinctly prove this point, or there must be a verdict for her. If the proof had been laid on her, then she must have been prepared with the best evidence to support her legitimacy. The testimony of near relations in that case would have been good evidence for her. And in the present circumstantial case, their evidence, although adduced against her, is not to be thrown out of view.

This is the general view of the evidence. You are not, however, to decide by mere sus-

picion, but must ask yourselves, has the pursuer proved his case to complete satisfaction?

BELL
v.
BELL.

[His Lordship then commented on the evidence, and remarked on the absence of any proof by medical gentlemen, that the defender was the daughter of a mulatto.]

You heard it doubted if the near relations are competent witnesses. I think they are; but I now tell you, that you are to take their evidence with considerable allowance, and that it is to be weighed with care and scrupulosity.

With respect to her father's marriage to a mulatto, there is no law against such marriages, but merely a strong prejudice, as against an improper connection.

Verdict—"For the defender, in respect the
"illegitimacy of the defender is not proved."

Cockburn and Maitland for the Pursuer.

Jeffrey for the Defender.

(Agents, *Johnston & Little*, and *Wm. Martin.*)

An application was made to the Court of Session for a new trial, on the ground of a *res noviter*, &c. The pursuer was appointed

BELL
v.
BELL.

to give in a special condescendence of the circumstances, and the names of the witnesses.

The Court afterwards refused the new trial; on the ground, that if the pursuer did not know the facts to which he referred before the trial, he might have done so.

PRESENT,
LORD GILLIES.

1819.
May 31.

EDINBURGH, LEITH, and HULL SHIPPING
COMPANY, v. OGILVIE.

Finding as to delivery of a cask of paint, and that, by the usage in Leith, delivery of goods to carters there, is not equivalent to delivery to the consignee in Edinburgh.

SUSPENSION of a charge by the defender for the price of a cask of paint.


DEFENCE.—The cask was delivered to a Leith carter, with proper directions.

ISSUES.

“ 1st, Whether the suspenders, on or
“ about the 17th May 1814, delivered the
“ goods referred to in the lybel, to Widow
“ Wilson and to George Stedman, members
“ of the Society of Carters in Leith, with

“ proper directions to deliver the same to the
“ charger ?

“ *2d*, Whether, when goods are trans-
“ mitted by smacks or coasting vessels from
“ England, and consigned to persons in
“ Edinburgh, delivery of the said goods to a
“ member of the Society of Carters in Leith,
“ with proper directions, but without a re-
“ ceipt, or insertion in the Carter's books, is,
“ by the usage of the trade in Leith, held to
“ be equivalent to delivery by the ship-own-
“ ers to the consignee in Edinburgh ?”

EDINBURGH,
LEITH, and
HULL SHIP-
PING Co.
v.
OGILVIE.


Two casks of paint were sent to the de-
fender. He admitted receipt of one, but said
the largest had not been delivered. The
suspenders, pursuers of the Issue, maintained,
that their contract was only to carry goods to
Leith, and that delivery there to a regular
Leith carter was sufficient.

A witness was called to prove, that de-
livery to a Leith carter was held good de-
livery, and was proceeding to state an in-
stance in support of his opinion.

Parol evidence
incompetent in
proof of a deci-
sion in a Court
of Record.

LORD GILLIES.—This was a trial in a
Court of Record, and we cannot take the
decision from a witness.

EDINBURGH,
LEITH, and
HULL SHIP-
PING Co.
v.
OGILVIE.

A witness re-
jected, from an
error in the
name inserted
in the list.

An objection was taken to a witness, that his name was not in the list; the name in the list being J. F. Walker, instead of James Thomas Walker.

LORD GILLIES.—I must proceed on the same rule as in the Court of Justiciary, and reject this witness.

When the first witness for the defender was called,

Jeffrey objected.—He is interested, as he is a partner of the present Shipping Company, in which the late company is merged, and for the debts of which they are liable.

Forsyth.—They must prove this if they insist in it. His interest, if he has any, is against us, and therefore he is a competent witness for us.

LORD GILLIES.—The Edinburgh, Leith, and Hull Shipping Company does not now exist, and cannot be represented. The present Company is not here as a party, and where is the evidence that the former one merged in this? If you mean to prove this by a witness, I think that evidence would be incompetent.

A bulker's book
being sworn to
be an office
book, received
as evidence.

A witness produced the bulker's book, written by a clerk.

Jeffrey objects.—The clerk ought to be called.

LORD GILLIES.—The witness held this to be an office-book, and regulated his conduct by it. I therefore hold it to be evidence.

EDINBURGH,
LEITH, and
HULL SHIP-
PING Co.
vs
OGILVIE.


Jeffrey.—The sum demanded is very small, but involves a general question. We shall prove by our landing book, that the cask was delivered to a Leith carter, which is the same as delivery to a carrier; and when things are lost, it is the carter who is liable.

Cockburn.—The simple fact in this case is, whether this cask was delivered? We shall prove that it was not delivered. They prove that they delivered it to a carter; but he did not deliver it to the defender.

The second Issue is not a question of opinion, but *usage*; and they have failed in proving it. Leith carters are not carriers.

LORD GILLIES.—We have merely the question of fact to try; and it appears to me, that the landing book of the Company, the bulker's book, and the carter who actually received the cask, are sufficient to prove the

EDINBURGH,
LEITH, and
HULL SHIP-
PING Co.
v.
OGILVIE.



first Issue, and to warrant you in finding that the cask was delivered to the carter.

On the second Issue it is impossible to deny that there is contradictory evidence; and, what is singular, the witnesses were perfectly fair, and appeared to give their evidence under a proper sense of their oaths. The Shipping Company being pursuers, are bound to prove the affirmative of the Issue, which is, not what *should* be the rule, but whether it was held as the usage of Leith, to free the Company, on delivery to the carter.

The evidence for the pursuers, I conceived sufficient to prove their case; but there have been a number of witnesses equally respectable brought on the other side. The question is, whether the pursuers have proved the understanding to be general? and if you cannot go that length, you must find for the defender.

Verdict—"For the pursuer on the first Issue, and for the defender on the second."

Jeffrey for the Pursuer.

Forsyth and *Cockburn* for the Defender.

(Agents, *Daniel Fisher*, and *James Dunlop*, w. s.)

MATHESON
v.
NICOLSONS,

PRESENT,
LORD PITMILLY.

MATHESON v. NICOLSONS; and M'DONALD
&c. v. MATHESON.

1819.
June 1.

THE first of these was an action of damages against one of the trustees on the estate of Courthill, for not putting the pursuers in possession of certain portions of that estate. The other, an action of damages by the trustees against the tenants, for not taking possession when offered.

Damages for
not putting the
pursuers in
possession of a
farm.

DEFENCE.—The pursuers were not refused possession; they did not bring stock for the farm; or produce caution, in terms of the minute of lease.

ISSUES.

“ Whether the defenders refused to give
“ the pursuers entry and possession to certain
“ portions of the lands of Laginduin, referred
to in the summons, at Whitsunday 1816,

MATHESON
v.
NICOLSONS.

“ conform to, and in terms of, the mutual mis-
“ sives of lease entered into between the said
“ parties, on or about the 14th day of May
“ 1816, to the loss and damage of the said
“ pursuers? Or,

“ Whether the pursuers, being duly offer-
“ ed possession by said defenders, of the
“ lands aforesaid, in terms of the missives,
“ refused to accept of the same, to the loss
“ and damage of the said defenders?

“ Damages claimed by pursuer, L.300.

“ Damages claimed by defenders, L.400.”

Buchanan.—One of the trustees let the land without authority, and broke his bargain, as the shortest way of settling matters. The pursuers were ready with a cautioner, but not bound to produce him, till a regular tack was furnished. It was not sufficient to warn the former tenants: they ought to have been ejected.

Cockburn.—The pursuers were not prepared to enter into possession; and finding a disposition in the former tenants not to remove, they wish to found on this a claim of damages. Even if the defender broke bargain with them, it does not follow that they must have damages, as they offered L.30 for

the farm, and it is now let for L.20. The trustees, not finding the pursuers ready to take possession, did not proceed to eject the former tenants.

MATTHEWSON

Nicolson.

Jeffrey.—The second Issue being abandoned, is a decisive fact in our favour. We are entitled to damages for the disappointment, as well as for the actual loss.


LORD PITMILLY.—This appears to belong to a very simple class of cases; and I have no doubt you will give a verdict satisfactory to justice.

There are here mutual claims for damages, upon the exact same facts. The action at the instance of the tenant, was long before that for the landlord, who seems to have thought that he would stand in a better situation as pursuer, than if he was merely defender.

The defenders have brought no proof of the second Issue; and you are therefore to consider this merely as a claim of damages on the part of the pursuers; and the questions are, 1st, Whether damages are due; 2d, The amount.

The history of this case seems to be, that Nicolson sent for the pursuers;—that he in-

MATHESON
v.
NICOLSONS.



tended to let the possessions to them, and fixed a rent;—that this agreement was reduced to writing, but disapproved of by the other trustees.

You cannot doubt that the landlord is bound to give possession, and make the ground clear for the tenant, who is not bound to take violent possession.

It is said, and truly, that the tenant did not come with servants, &c.; but are you from this to infer, that he would not have come with them if the ground had been cleared? He did his duty by coming to inquire whether he was to get possession. I also agree with the counsel for the pursuers, that they were not bound to bring security till the lease was made out. I therefore consider, that there is no defence in this case, and that you will find damages.

With respect to the amount, the rent was probably high, and the damages will therefore be the less; but being a losing bargain is not a sufficient reason for refusing damages for the disappointment.

Verdict—"For the pursuers, damages L.50."

Jeffrey and Buchanan, for the Pursuer.

Cockburn, for the Defenders.

(Agents, *James Pedie*, w. s. and *James Macdonald*, w. s.)

On the 8th March, *Robertson* moved to have the place of trial changed from Edinburgh to Inverness, and rested on M'Kenzie's road case, where it was stated that this had been done, and Hyslop's. See Vol. I. p. 43. (n.)

Jeffrey opposed the motion.

LORD GILLIES.—It is very disagreeable to decide a question of this nature, where the difference of expence is the only reason stated. The parties have the same object ; and I cannot conceive how they should differ upon it. I think the pursuer, by giving notice, has a *jus quiritum* ; and strong reasons are stated in both affidavits. The cases cited do not appear to me to apply, as in the one there was a view, and the other was not changed on the ground of expence.

If the parties act *bona fide*, they are best qualified to judge of this ; and I shall therefore delay giving judgment.

Two days after, the case was moved before Lord Pitmilly.

LORD PITMILLY.—When the pursuer has a place of trial, it requires a strong case to induce the Court to alter it. It would be extremely wrong to increase the expence, by bringing such a host of witnesses as is proposed. I therefore dismiss the motion.

MATHESON
v.
NICOLSON.

Motion to have the place of trial altered, in order to save expences, refused.

DICKSON
v.
PRINGLE.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1819.
June 24.

DICKSON v. PRINGLE.

Specification
of the papers
called for, ne-
cessary to en-
title a party to
a diligence.

Russel, Form
of Pro. pp. 33
and 97.

Cockburn moves for a diligence to recover all tacks, &c. in the possession of the defender, relative to the subject in dispute, and states:— This is not a diligence to fish for information before the action is brought, but to procure evidence to prove our case. The only difficulty is, whether this Court has power to grant it. It was understood to have it, and the power has been exercised.

Baird.—I do not object on the want of authority, but that the writings are not specified. A diligence is not always granted in the Court of Session—*Lady L. Crawford v. Lord Crawford*, 8th August 1783.

LORD PITMILLY.—As the party does not object, it is unnecessary to say any thing as to our power; but I think a wrong inference is drawn from § 5. Act of Sederunt, 9th July 1817, in page 97 of Mr Russel's book. It

is the first section, pages 93, 94, which applies here.

DICKSON
v.
PRINGLE.

It is not competent to grant a general diligence to search a charter chest, but the party must specify the paper he wants. But when the demand is for a diligence to recover other writings in evidence of a fact, the case is totally different. The Court, however, will not grant a general diligence, but only to recover writings relative to the subject of dispute; and these to be produced in presence of a person who is capable of judging of them. There may be private entries in books, or the haver may refuse to produce the document; and the Court will then hear the objection, and the Act of Sederunt would apply.

The motion yesterday was not sufficient, from want of specification; to-day it is.

LORD CHIEF COMMISSIONER.—Yesterday when I sat alone, I thought there was difficulty on both points; but now I am satisfied, from the whole purview of the Act of Sederunt, and the nature of the Court, that the Court has power to grant the diligence. I thought the notice yesterday too general, and that it was an attempt to get a diligence to recover papers of which a list had not been

DICKSON
v.
PRINGLE.

given. My brother is of the same opinion. There is now a sufficient specification of the nature of the papers, and a general reference to the dates. We shall therefore grant the order, in terms of the amended motion.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1819.
July 5.

Damages for
defamation.

AITKIN v. REID and FLEMING.

AN action of damages, for defamation, against the defenders, *or either* of them.

DEFENCE.—The action, as laid, is not relevant; but if relevant, the statements are denied.

In this case, the Issue was, Whether on or about, &c. the defenders, or one or other of them, did falsely, &c. state to, &c. “ that
“ the pursuer had entered into a collusive
“ agreement with Duncan Weir, for the
“ purpose of defrauding Mr Alexander Bonar,” &c.

A witness having stated that a person had informed him that Mr Bonar had heard the report,

Cockburn.—This is not evidence.

LORD CHIEF COMMISSIONER.—It is not evidence of the words, but it may shew that Mr Bonar acted upon the information.

AITKIN
v.
REID, &c.

In damages for defamation, proof of a report competent to shew that a person acted upon it, but not competent in proof of the words reported.

Jeffrey.—The pursuer was anxious to bring only the person with whom this report originated. He traced it up to the defenders, who each stated, that he had it from the other.

Cockburn for Reid, and *Forsyth* for Fleming, stated, The pursuer is not entitled to damages for any silly expression, even though damages followed. The pursuer has not proved his case.

LORD CHIEF COMMISSIONER.—There are disadvantages in allowing actions of this sort, where there is no accusation of a crime, or allegation of specific damage. By the law of Scotland, however, any thing defamatory is the foundation of an action.

In all cases, it is most material to inquire, 1st, Whether the matter in the Issue is

AITKIN
v.
REID, &c.


proved? and 2d, Whether any; and what damage is proved?

It appears from the Issue, that the accusation was, of having entered into a collusive agreement; but the nature of the agreement is not stated.

Whatever the statement was, it appears to have originated with Fleming. Three witnesses speak to the words. The first says, they *could*, or *would*, which does not amount to proof of the Issue, which is, whether they *had* entered into a collusive agreement. You must consider whether the statement was made; and if it was, then the law infers damages; but I think in this case the amount will be very small, as Fleming regretted having mentioned the story, which takes away the malice, except such as law presumes.

As to Reid, if he propagated the slander, he is equally liable with the other. As to what he said at a subsequent period, it is not in the express terms of the Issue; but you are to say whether he intended to impress his hearers with the belief that the pursuer had entered into a *collusive agreement*.

There is no specific damage proved; and you will, I have no doubt, treat the case with

that moderation which is the best way of doing justice.

AITKEN
v.
REID, &c.
}

Verdict—"For the pursuer, L.80 damages against Reid, and L.20 damages against Fleming."



Jeffrey for the Pursuer.

Forsyth for Fleming.

Cockburn for Reid.

PRESENT,

LORD CHIEF COMMISSIONER.

BEATSON v. DRYSDALE.

1819.
July 8.
}

AN action of damages for assault and battery.

Damages for
assault and
battery.

DEFENCE.—A denial of the assault charged.

ISSUE.

"Whether, upon the 18th day of August
"1818, or about that time, the defender did,
"at or near the harbour of Burntisland, vio-

BRATSON
v.
DRYSDALE

“lently assault or strike the pursuer? Or
“did also violently plunge or immerse him
“in the water of the said harbour, to the in-
“jury and damage of the said pursuer?
“Damages laid at L.500.”

A number of boys were at play near the defender's garden, and the pursuer and another boy were passing. A stone was thrown into the garden, and struck the servant of the defender, on which the defender came out, and chased the pursuer, and beat and plunged him in the harbour.

The wife of John received as a witness, though described in the list as the wife of James.


The first witness called was the wife of John Johnston, inspector of herring fishery.

Forsyth objects.—She is not in the list of witnesses. There is the wife of *James* Johnston.

LORD CHIEF COMMISSIONER.—Is James the inspector of herring fishery at Burnt-island? If so, I think that sufficient designation in so small a town.

Cockburn, for the defender.—This is a foolish case; and as no damages have been proved, the Jury have no right to shew their opinion of the defender's conduct. He had

reasonable grounds to believe that the pursuer threw the stone.

BEATSON
v.
DRYSDALE.


LORD CHIEF COMMISSIONER.—This is a very short case; and, as it is proved, the only question is the damages.

I do not understand the doctrine, that though an assault is proved, no damage is done. The only defence to the action is to set up and prove a justification.

In such a case as the present, you ought to be sure of your ground before giving exemplary damages; and excessive damages ought never to be given. Where an action is for a debt, a verdict must be given, whatever consequences may follow; but where the action is for damages, all circumstances must be taken into account, and the damages fixed with moderation.

Verdict—"For the pursuer, L.80 damages."

Jeffrey, for the Pursuer.

Forsyth and Cockburn for the Defender.

On a motion for expences, Mr Forsyth stated that the damages were too high.

The amount of expences does not depend on the amount of damages.

BEATSON
v.
DRYSDALE.

LORD CHIEF COMMISSIONER.—That is a matter we cannot take into consideration. The damages are in the hands of the Jury, and we cannot say that we are to affect their verdict in giving expences.

LORD PITMILLY.—This is impossible, it would be taking the question of damage out of the hands of the Jury.

LORD GILLIES.—On the principle contended for at the Bar, if we thought the damages too low, we might give high expences, and thus render the Jury a nullity.

==
PRESENT,

LORD CHIEF COMMISSIONER.
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1819.
July 9.

MACKENZIE v. MURRAY.

Damages
claimed for de-
famation.

AN action of damages for defamation.

DEFENCE.—There was no intention to defame, and no injury followed.

ISSUES.

“ 1st, Whether, on or about the 6th day

“ of January 1818, the defender did falsely
 “ and injuriously assert, to divers persons as-
 “ sembled in his, the defender’s house, near
 “ Perth, that the pursuer had become bank-
 “ rupt, or insolvent, to the injury and da-
 “ mage of the said pursuer ?

MACKENZIE

MURRAY.

“ 2d, Whether, in the beginning of the
 “ said month of January 1818, the defender
 “ having gone to Dundee, did falsely and in-
 “ juriously say, or assert, to various and sun-
 “ dry persons in said town, and in particular
 “ to Mr John Duff, junior, that the pur-
 “ suer was bankrupt or insolvent, to the da-
 “ mage and injury of said pursuer ?

“ Damages laid at L.5000 sterling.”

The first witness called was the servant
 of the defender, who was asked, if such and
 such persons were present. This was objected
 to, as leading the witness.

In examining
 a witness, a
 counsel may
 lead up to the
 point, but not
 in the question.

She was afterwards proceeding to state
 what one of the ladies said.

LORD CHIEF COMMISSIONER.—You may
 ask who were the persons present. You may
 lead up to the point, but must not lead in
 the question at issue.

Cockburn, for the pursuer.—The second

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v.
MURRAY.

Issue is given up, but the defender being a friend of the pursuer, made the calumny the worse.

Jeffrey.—A verdict for the defender will not only do justice to him, but be of service in checking frivolous and vindictive actions of damages. The defender being cautioner for the pursuer, was entitled to mention the subject of his affairs in presence of his near relation. No malice is stated, or pretended.—

Starkie, 241.

Starkie's Law of Slander. 2d, If a report is mentioned, when occasion calls for it, the party is not answerable if he mentions the words, and from whom he heard them. The party must go against the first who stated the report.

Starkie, 244.

LORD CHIEF COMMISSIONER.—If the defender insists on calling evidence, or if the Jury wish it, I am ready to receive it; but I have no hesitation in saying, that I think the pursuer has made out no case to entitle him to a verdict. It is perhaps sufficient to say, that the servant being a single witness, not supported, but contradicted by circumstances, her testimony is not sufficient to prove the case.

Even if her testimony were sufficient in

law, it is clear the case is not made out, for she did not prove any thing said as to the pursuer being bankrupt or insolvent, but merely that he had stopped payment, which is a very different libel. There is every circumstance of extenuation: there was no malice; not even flippancy in the manner; and it was not afterwards the subject of conversation; and malice is the very gist of the action.

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v.
MURRAY.

In England, the law on this subject is very particularly defined. There, no action will lie for words spoken, unless they are such as impute a positive crime, or a contagious disorder, or injure a person in his profession and calling. In this country, the tendency of the law is different. Here any thing that produces uneasiness of mind is actionable; and therefore Juries ought to be the more cautious in the amount of the damages they give.

Verdict—" For the defender."

Forsyth and Cockburn, for the Pursuer.

Jeffrey, for the Defender.

(Agents, *D. Fisher, and Geo. Andrew.*)

ALLAN
v.
M'LEISH.

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1819.
July 10.

ALLAN v. M'LEISH.

Damages
against the
proprietors of
a stage-coach,
for injury done
by the negli-
gence or im-
proper conduct
of their ser-
vants.

AN action of damages against the proprietors of a stage-coach, and their guard and driver, for injury done by an overturn of the coach.

DEFENCE.—The overturn was an accident, for which the defenders are not answerable.

ISSUE.

“ Whether, on or about the 25th day of
“ July 1818, the Waterloo coach, of which
“ the defenders are proprietors or contractors,
“ was overturned betwixt the North Queens-
“ ferry and Inverkeithing, in consequence of
“ the negligence or improper conduct of the
“ coachmen or guard, whereby the pursuer,
“ then a passenger in said coach, suffered bo-
“ dily harm.

“ Damages laid at—for medical expences
“ L.200 ; for solatium L.5000.”

ALLAN
v.
M'LEISH.


The Waterloo coach, of which the defenders are proprietors, soon after leaving the north side of the Queensferry, was proceeding with great velocity, and on turning a corner, was overturned. It appeared that the coachman wished to pass a gig upon the road ; and there were some witnesses called, to shew that the pursuer, who was on the outside of the coach, had urged the coachman to do so. A number of the passengers were hurt, and the pursuer very much so.

After several witnesses were examined, the pursuer gave in evidence the first and second articles of the revised answers for the defenders, to the condescendence for the pursuer.

Jeffrey, for the defenders.—I suppose they mean to give the whole paper in evidence.

LORD CHIEF COMMISSIONER.—They may read such parts of it as they please, but this will entitle you to read all that relates to what they give in evidence. They must, however, read so much as to make the quotation intelligible. The second article I hold not to be evidence.

A party giving in evidence one part of a document, entitles the opposite party to read from it all that relates to the same subject.

ALLAN
v.
M·LEISE.

Moncreiff.—We do not put it in to prove a fact, but to shew that the defenders made the statement.

Questions being put to several of the witnesses as to the state of the road,

LORD CHIEF COMMISSIONER.—If this was a question with the road trustees, the road being bad would be a material circumstance; but in this case, I do not see how it applies. The material fact here is, that the situation is proved to be such, that a careful driver and trust worthy guard think it necessary to drive with caution at the place.

Query, Whether a party intending to bring an action against *James Mitchell* and others, but by mistake inserting *John*, excludes *James* from giving evidence for the other defenders.

When *James Mitchell*, the guard, was called,

Moncreiff objects.—He is a defender.

Cockburn.—They intended to make him a defender; but they have not called *James*, but *John Mitchell*.

Moncreiff.—The question is, if this was by the negligence of the guard, driver, &c.

LORD CHIEF COMMISSIONER.—The question here is, whether you have brought your action against the witness now called.

It is not enough to exclude a witness, that his case is similar to the one under trial; it

must be the same. It is very different if the damage is merely consequential.

ALLAN,
v.
M'LEISH.

LORD GILLIES.—This is a misnomer. John Mitchell was not the guard; but in the course of my experience, I have not seen such a witness called.

Moncreiff.—The execution of the summons is against *James*, not *John*.

LORD CHIEF COMMISSIONER.—That puts an end to the question; but as there is no doubt of the identity of the person, I should have been very much disposed to correct the error of the name.

Murray opened the case for the pursuer, and stated, that the Jury ought to give exemplary damages, to insure attention in driving stage-coaches.

Jeffrey.—This is an action against the proprietors of a coach, solely for the negligence of their servants. I do not deny that they are liable; but the damages ought not to be vindictive; neither ought there to be the least feeling of the necessity of repressing negligence in drivers. The question is, whether the injury has been occasioned by the culpable negligence of the driver. Proprietors are not liable for

ALLAN
v.
M'LEISH.



accident, and from what I shall prove, you must hold this to have been a case of accident. The coach was not furiously driven; and we shall prove that this pursuer urged the coachman to drive faster.

Forsyth.—Proprietors are liable for the conduct of their servants. If the pursuer urged the driver to go too fast, he ought not to have complied.

LORD CHIEF COMMISSIONER.—In the long investigation which has taken place, much has been said of the law, and many observations have most properly been made as to the amount of damages. I hold the law to be most correctly stated in the Issue. The question is negligence, or improper conduct. The proprietors are bound to find proper persons to conduct the coach; and if they fail, they are liable in damages; but it is a mere civil question of reparation, not of punishment.

On the question so much argued at the Bar, whether the pursuer is cut out of his redress, by his conduct in exciting the driver to push his horses, I think both sides go beyond the mark. Proprietors are bound to find persons not only capable of conducting the coach properly, but who will not be excited to im-

proper conduct. If the person appointed does yield to the excitement, they must repair the injury done. The question of damages may be materially affected by the pursuer's conduct; but I cannot say that there ought to be a verdict for the defendants, as would be the case if the pursuer's conduct were a bar to his action.

ALLAN
v.
M'LENN.


The evidence here may be classed under three heads.

1. The cause of the accident.
2. The amount of the injury, and the expence of the cure.
3. The pursuer's conduct.

It was stated in defence, that the overturn was occasioned by a stone on the road; but from the evidence, I think you will be satisfied, that it was occasioned by the nature of the situation, together with the quick driving, whatever was the cause of that quick driving.

On considering the evidence, you must say whether the overturn was not occasioned by the negligence or improper conduct of the coachman or guard; and if you are satisfied that it was, a verdict must follow for the pursuer, as I state to you as matter of law, that the excitement by the pursuer only goes

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v.

M'LEISH.



in diminution of damages, not as a bar to the action.

Having made up your minds on the main question, you will then consider the evidence in extenuation, and whether the pursuer so far misconducted himself, as to occasion the injury to himself and others. How far this is proved, is matter for your consideration. It depends on the testimony of a single witness; but as it is supported by circumstances, I am bound to submit the evidence to you. [His Lordship then stated the circumstances, shewing the probability or improbability of the truth of the evidence of the witness, and that if the Jury thought the fact proved, they would give what they considered reasonable damages; but if not proved, then they would give damages on the pure facts of the case. In either case they should be inclined to moderation, rather than extravagance.]

Verdict—"For the pursuer, L.200 for
"medical expences, and L.1000 for da-
"mages and solatium."

Forsyth, Moncreiff, and J. A. Murray, for the Pursuer.
Jeffrey, Cockburn, and Henderson, for the Defenders.

(Agents, *R. Dick and Francis Wilson.*)

In taxing the account of expences, the auditor had struck off a considerable sum.

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v.
M'LEISH.

Henderson moved that the account be approved.

Murray admitted that part was properly struck off, but contended that three counsel were necessary, as the case was tried on the last day of the Session, when it was difficult to insure the attendance of counsel.

A party employing three counsel at a trial, found entitled to part only of the fees paid to two of them.

LORD CHIEF COMMISSIONER.—This is an important question, and I am happy it has been brought forward, chiefly as it affords an opportunity of stating the distinction of expences, as between party and party, and agent and client. This distinction has always been known in England, and has been acted upon in the Court of Session, ever since the appointment of the auditor. A party can only be charged with what is reasonable; a client may give what suits his views and fancy.

It is a very delicate matter for the Court to interfere with the remuneration to counsel; but in this case the fees are much higher than would be reasonable, if there were several cases tried in a day; and as they are higher than those paid on the other side, I approve of the deduction made. I also approve of allowing

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v.
M'LEISH,


only two counsel, and do not think what is stated, as to gentlemen having to leave the Court of Session, a sufficient reason, either for the number of counsel employed, or the amount of the fees paid.

In England, cases are argued at the same time in different Courts, e. g. in the Courts of Exchequer and Chancery, and before the Vice-Chancellor and Master of the Rolls; but no higher fees are given on that account; and even when a counsel is taken off his circuit, and a large sum paid, in taxing the costs against the opposite party, only the usual fee is allowed.

LORD PITMILLY.—I am satisfied that the auditor's report ought to be confirmed in all its parts. The distinction taken as to costs between party and party, is an important one. The report in this case appears to me founded on just principles, and I hope this will be taken as a precedent in other cases.

LORD GILLIES also expressed his concurrence in this decision.

SPENCE
v.
HOWDEN, &c.

PRESENT,
LORD CHIEF COMMISSIONER.

SPENCE v. HOWDEN, &c.

1819.
July 12.

A SUSPENSION and interdict, to prevent Mr John Spence being admitted a member of the incorporation of goldsmiths of Edinburgh, on the ground that he had not served a regular apprenticeship.

Circumstances in which it was found that an apprentice did not serve during seven years.

DEFENCE.—He did serve.

ISSUE.

“ Whether John Spence, the charger,
“ served an apprenticeship to his father as a
“ goldsmith, for the period of seven years
“ from and after the 19th May 1804, in
“ terms of the regulations of the incorpora-
“ tion of goldsmiths?”

In 1804, Mr Spence had been entered in the books of the incorporation of goldsmiths, as an apprentice to his father, and for some

SPENCE
v.
HOWDEN, &c.

time served regularly ; but afterwards having attended Mr Lea, a dentist, it was alleged that he could not regularly complete his time with his father. In 1814, Mr Spence began business as a surgeon dentist in Edinburgh, and afterwards applied to be taken upon trial as a goldsmith, with a view to being admitted a member of the incorporation. This application was resisted, but the objections were overruled, and an assay was appointed to Mr Spence, upon which the present application was made to the Court.

The first witness called was the father of the pursuer.

Clerk, for the defenders.—They know he is incompetent.

Cockburn.—We think he is admissible, as he is a necessary witness, and the facts arose at a time when there could be no idea of calling him.

LORD CHIEF COMMISSIONER.—Is there any instance in which a father was allowed to be called as a necessary witness? The pursuer must of course prove the necessity before calling him. The commencement of the service may be proved by writing. I therefore decide that he is inadmissible in *hoc statu*.

A witness was asked the date of the indenture.

LORD CHIEF COMMISSIONER.—I doubt if you can ask the date of the indenture; but you may ask at what time the service commenced.

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v.
HOWDEN, &c.
Incompetent to prove by parol, the date of a written instrument.

A Juryman wished to ask a witness, whether he heard that the pursuer was also under indenture to Mr Lea.

Evidence of hearsay incompetent.

LORD CHIEF COMMISSIONER.—The answer would not be evidence, and therefore the question cannot be put by any part of the Court.

A witness having stated that the pursuer had abandoned his father's business, and gone to Mr Lea, was asked, whether he did not still attend his father's shop.

LORD CHIEF COMMISSIONER.—Your own witness has proved that he abandoned his father's business. I agree that it is not necessary to prove a constant attendance; but here the Issue is, if he abandoned this business, and your own witness swears that he did.

Evidence of skill incompetent to prove that an apprentice had served during the time required by his indenture.

A witness was called to prove that the pursuer had performed the assay appointed by the corporation.

SPENCE
v.
HOWDEN, &c.

Clerk and *Baird* object.—It is not in the Issue.

Cockburn.—It tends to prove that he attended regularly.

LORD CHIEF COMMISSIONER.—It is incompetent (and it has been often so decided) to go out of the Issue. The Issue is the rule which bounds the admissibility of evidence. It may be obscure, or doubtfully worded, and may require explanation. Are there in this case doubtful words? The Issue is sent, to enable the Court of Session to decide whether they ought to prevent the pursuer from being admitted a member of this corporation. The first part of the Issue is, whether he served seven years; and if it stood here, there could be no doubt that the evidence tendered would be incompetent. The Issue, however, farther states, “in terms of the regulations of the incorporation of goldsmiths.” This entitles the pursuer to prove these regulations. If an assay is part of those regulations, the assay must be in evidence; but does the assay prove, or is it possible that it can have any effect on the time? Mr Cockburn says he produces it, not to prove that the pursuer could make it, but to shew that he served seven years. How

does this appear, unless he can also shew, that being able to make an assay, is to be held an equivalent for seven years service. Time is one thing, and skill another; and it has not been proved that the one is to be taken as an equivalent for the other. In the circumstances it would be going beyond the question sent, were we to admit this evidence; and there is a difficulty even in admitting evidence of the equivalent, as the Court of Session, if they wished that question tried, ought to have sent an Issue upon it.


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v.
HOWDEN, &c.

Cockburn again tendered the pursuer's father as a witness, and stated, he is necessary, as the only witness who can prove that the pursuer had leave of absence. Having called the other persons connected with the shop, we are now entitled to call the master.

Circumstances in which the father of a defender was admitted as a witness.

Clerk and Baird.—Near relations are only admissible when the necessity arises from the nature of the thing, and other evidence cannot be expected. This was solemnly decided in 1775, and it is believed the decision was entered in the books of sederunt. Till last Session the rule was held inviolable, and even then, the general rule was distinctly admitted, though, in a case of a private and peculiar nature, its application was questioned.

SPENCE
v.
HOWDEN, &c.




The *penuria testium* must arise from the nature of the thing, not from the fault of the party.

LORD CHIEF COMMISSIONER.—We are rather in a wrong course here. Mr Cockburn ought to have called the witness: Mr Clerk would then have stated his objection, and Mr Cockburn should have answered.

I was most anxious to hear the discussion, as the question is a very general and important one. A *penuria testium* is a reason for getting over the objection of relationship, but it must be a penury arising from the nature of the thing. Suppose a secret trade carried on by a father and a son—it would then be reasonable to call the father; but this is a public shop, and the attendance may be proved by the persons who frequented it, or by those who wrought along with the pursuer. At first I thought, that admitting the father might appear like allowing the pursuer to call him, when he had failed to prove his case by proper evidence. I am now satisfied, however, that in this case I ought to admit him to the extent of proving a reasonable leave of absence. We must not confound the objections to admissibility and credit;

for, though admitted to prove this single point, the question of what credit is to be given to the testimony of so near a relation, remains open for the Jury. It is said the father had not power to cut off three years from the term of apprenticeship required. I do not mean to enter into the question as to what leave of absence the father was entitled to give, but may now mention, that Mr Cockburn can gain nothing by asking questions as to so long a period as three years. I merely admit the testimony to prove a reasonable leave of absence, and shall take a note of this direction, that the subject may be afterwards discussed, if parties are dissatisfied with my decision. It always appears to me safest to lean to the admission of testimony, leaving the credit due to it for the consideration of the Jury.

SPENCE
v.
HOWDEN, &c.



Mr Clerk, in opening the case for the defendants, stated that some details did not require proof.

LORD CHIEF COMMISSIONER.—Every latitude is given to a gentleman opening a case; but with a distinct avowal that statements are not to be proved, it is impossible to allow them to be made.

In opening a case, counsel ought not to state facts which he does not intend to prove.


SPENCE
v.
HOWDEN, &c.

Cockburn, in opening the case, and in reply, contended—The simple question is, Whether the pursuer served the last three years of his apprenticeship? We shall prove, by the neighbours, customers, &c. that he was considered an apprentice; and his father will prove, that, when absent, it was with his leave. The purpose of attending is to qualify him to be a goldsmith; and he has proved his qualification to the satisfaction of the corporation.

The only question of any difficulty is a question of law, What shall be held as sufficient to constitute an apprenticeship? and I am entitled to a special verdict, finding that there was regular attendance for four years, and such an attendance for the other three as you may think proved.

Clerk, for the defenders, insisted—The pursuer has only proved four years attendance, and seven are required. During the last three, even the father will not swear to particulars of the absence; but merely says, in general, that his son was never absent without his leave. It is clear that Mr Lea could have compelled him to attend; and it is therefore impossible, that, at the same time, he could be apprentice to his father.

LORD CHIEF COMMISSIONER.—This I consider a general Issue; and if ever there was a case in which a general answer should be given, it appears to me that it ought to be in this case; for, with the exception of one fact, and one or two subordinate facts, there is no evidence which would warrant a return of a special verdict. If you give a verdict for the pursuer or defenders, it will be for the other party to move for a new trial, on the ground that it is contrary to evidence, or contrary to law; but in the present state of the evidence, I do not know what facts could be found.

SPENCE
v.
HOWDEN, &c.


The question is, if he served in terms of the regulations. The first charter requires a complete service, and the second charter requires fair service. There must be good faith: fraud vitiates the transaction; not merely such fraud as is punished; but there must be that fair dealing, which, if wanting, the civil court will defeat the rights of the party.

In order to give a distinct answer to the question, it is proper to take a view of the nature of the case. There was an honest and fair commencement of the apprenticeship, and an honest and fair service down to 1808; and if the whole of the case had been like this, there

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^{v.}
HOWDEN, &c.

could have been no question ; but there was then a considerable variation, and the father gave his son leave to attend Mr Lea. He might fairly give him leave to attend, to get general instruction ; but in the circumstances of this case, it is clear that the attendance was for the purpose of learning a different business. On considering the whole facts and circumstances, as given in evidence (part of which his Lordship read), you will say whether the honest and fair intention of being a goldsmith continued, and whether the pursuer has made out his case. If he has, you will find in the affirmative ; if not, in the negative. You will also attend to the circumstance, that, at the end of an apprenticeship, the same attendance is not given as at the beginning ; and that the leave of the master, if honestly given, will cure irregular attendance ; but I cannot conceive that it will cure absence for the purpose of learning another trade.

Verdict for the defenders.

*Cockburn and Fletcher for the Pursuer,
Clerk and Baird for the Defenders.*

(Agents, *D. Murray, w. s. and George Tod, Jun.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

PATERSON
v.
BLAIR.

1819.
July 14.

PATERSON v. BLAIR.

DAMAGES for being turned out of possession of a farm.

Damages
found, for be-
ing turned out
of a farm.

DEFENCE.—The proprietor was entitled to turn the tenant out of possession.

ISSUE.

“ What loss and damage has been sus-
“ tained by the deceased Walter Paterson,
“ and his representatives, in consequence of
“ the measures taken by the defender, to re-
“ move the said Walter Paterson from the
“ lands of Merchiston, in breach of the mis-
“ sives of lease, dated 18th May 1813, and
“ 16th November 1813, referred to in the
“ summons.

The damages and loss were laid in the sum-
mons at L.2000, which were stated under
different heads.

PATERSON
v.
BLAIR.



The defender, by missive letters in 1813, let to the pursuer part of the lands of Merchiston, near Edinburgh. The missives contained various stipulations, and amongst others, the tenant was to “give up whatever parts of the said ground may be wanted for the purpose of feuing or letting on building leases,” &c. Some differences occurred between the parties; and there being a dispute with the former tenant of part of the land, as to his quitting possession, the defender gave the pursuer notice, in April 1814, to give up the whole lands at the following Candlemas. An action of removing was brought, and decree allowed to go out, reserving the claim for damages.

A counsel who commences the examination of a witness, ought to continue it throughout.

After Mr *Cockburn* had cross-examined a witness, Mr *Baird*, on the same side, put some questions.

LORD CHIEF COMMISSIONER.—I do not in general wish to interfere; and there has been some irregularity in the practice on this point; but our rule is, that one counsel examines a witness throughout.

A book kept by a farmer, not evidence for him.

To prove the quantity of dung laid upon

the farm, Mr *Jeffrey* proposed to give in evidence a book regularly kept by the pursuer.

PATERSON

v.

BLAIR.

LORD CHIEF COMMISSIONER.—This book may be evidence against him, but certainly not for him.

An objection was taken to a witness, that he was interested, being a creditor on the pursuer's estate.

Jeffrey.—He is only brought to prove that the defender received L.20 from the pursuer.

LORD CHIEF COMMISSIONER.—Is there no receipt? It is clear the evidence is not necessary to the present discussion. Their objection to the witness is, that the present action is for the purpose of increasing the fund for the creditors, and that he has an interest to increase that fund.

A witness called for the defender, was desired to produce some letters, to shew that the rent was too high, and that, therefore, the pursuer could not be a loser by being deprived of it.

LORD CHIEF COMMISSIONER.—All the facts you state may be proved by parol. You therefore do not require the letters.

PATERSON

v.
BLAIR.

A part of an
inferior Court
Process, if
tendered in
evidence,
ought to be
produced be-
fore the trial.

A witness was called to authenticate a copy of part of a process in the inferior Court.

Jeffrey objects.—He is agent for the defender in several cases. This writing, had it been produced in terms of the Act of Sederunt, would not have required any authentication.

LORD CHIEF COMMISSIONER.—Is it really a disqualification that the witness was agent in other causes? I am of opinion on other grounds, that the testimony is inadmissible; for it appears that this is an attempt, by calling the agent, to make the averment of the party evidence in this case. There is a regular Act of Sederunt framed in concert with the Court of Session, which points out the manner in which writings ought to be produced; and unless that is followed, we cannot admit them under any other authority.

Jeffrey, in opening the case, and in reply, stated—The case is a very narrow one: it is to fix the amount of damages. The land was high rented as a farm; but the pursuer, a builder, took it for the quarries, and to supply his horses with food. He is entitled to damages, on account of the disappointment and vexation he suffered.

Cockburn, for the defender, maintained. The loss of the quarry is the only article proved; and the estimated value of this is notoriously too high. L.900 is claimed as the value of the quarry; and we shall prove that it is not worth working. There is no ground for *solatium*, as there was no injury to his feelings; and the motives of the defender make no difference to the pursuer.

PATERSON

v.

BLAIR.

LORD CHIEF COMMISSIONER.—This is a question of pure fact; and as the Court of Session have already found damages due, your duty is merely to ascertain the amount. The pursuer is called upon to specify of what the damages are composed; and having done so, it will be proper for you to find them separately. [His Lordship then stated what he considered proved as to the different articles; and that the real question was the loss of the quarry.]

Several of the witnesses gave an estimate of the value of it; and this is a sort of particular evidence; and I cannot state that you ought to give less than the lowest sum proved. You must exercise your good sense on the facts as proved; and as this is purely

PATERSON
v.
BLAIR.

a question of fact, any observations I make, are merely for your consideration.

As to *solatium*,—If you are satisfied that you give the sum which the pursuer has lost, this is all to which, in my opinion, he is entitled. It appears to me a mere question of accounting; but this also is matter for you to consider; and if you give *solatium*, I trust you will do it with moderation.

Verdict—“ Found for the pursuers, damages L.1000.”

Jeffrey and S. More for the Pursuer.

Baird and Cockburn for the Defender.

(Agents, *James Lyon*, and *James Gentle*.)

1819.
July 16.

Found that a person was of sound mind—that a deed was signed on the day inserted in the testing clause—and that it was not proved, that at that time the person was ill of the disease of which he died.

PRESENT,

LORD CHIEF COMMISSIONER.

ERSKINE v. ERSKINE.

REDUCTION of the assignation of a lease, on the grounds of death-bed, and of the granter being incapable of knowing the contents of the deed.

DEFENCE.—Negative to both grounds.

ERSKINE

v.

ERSKINE.

ISSUES.

“ 1st, Whether, at the time the deceased
“ William Erskine signed the assignation
“ under reduction, he was of sound mind, and
“ capable of understanding the nature of
“ said deed ?

“ 2d, Whether said deed of assignation
“ was subscribed by the said William Erskine,
“ upon the 2d day of August 1815, the date
“ it bears, or was so subscribed upon the 7th
“ day of August thereafter, or at a subse-
“ quent period ?

“ 3d, Whether the said deceased William
“ Erskine was ill of the disease of which he
“ died, at the time of his subscribing the said
“ deed ; and whether he was at kirk or mar-
“ ket after so subscribing ?”

The late William Erskine, the grandfather of the pursuer, acquired from Sir Charles Halket, a lease for 99 years, of a small portion of ground in the village of Cairnyhill. In August 1815 the pursuer's father assigned to Robert Erskine the remaining years of the

ERSKINE
v.
ERSKINE.

lease, and his son brought the present action to have the assignation set aside.

A document produced to prove collateral facts received, though not stamped.

The first piece of evidence produced for the defender, was a missive of a date prior to the date of the assignation.

Cay, for the pursuer.—When this was produced in the Court of Session, we stated that it was forged, and they withdrew it from process. It is not stamped.

Cockburn, for the defender.—In the Court of Session, we rested on this as giving a good right, in which case it must be stamped; but here we merely rest on it as a letter.

LORD CHIEF COMMISSIONER.—The only question is, whether this document is sufficient to prove facts and circumstances relative to this transaction. It is not rested on as a conveyance, otherwise it would have required a stamp; but I do not consider a stamp necessary, where the document is only produced to prove a fact or circumstance relative to another transaction. It is, however, open to the pursuer, in reply, to impeach the authenticity of this document, as he might the credit of a witness. The object of producing it seems to


be, to ascertain that the transaction had begun at the date of this document.

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ERSKINE.
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*Cockburn*, for the defender, maintained—  
The pursuer has failed to prove the first and third Issues. The presumption always is in favour of sanity. As no evidence has been offered to prove of what disease Erskine died, a verdict must go for the defender. On the second Issue there is only one witness, which is not sufficient in law; and it would be most dangerous to allow the recollection of a single witness to cut down a regular deed, which bears to have been executed on the 2d day of the month. A witness for us will swear that the deed was filled up and signed on the 2d, and the account paid on the 3d.

*Cay*, in opening the case, and in reply, stated the facts and the general outline of the law of death-bed, and admitted that there was a difficulty in the case, but maintained that it depended on the comparison of a witness on each side; and that his witness swore to a detail of facts in which he could not be mistaken; the other merely swore in general terms. It was not necessary to prove the disease, as it was admitted that Erskine never recovered.

ERSKINE,  
<sup>v.</sup>  
ERSKINE.



**LORD CHIEF COMMISSIONER.**—In this case the first Issue is out of the question; and therefore it will be better to find upon it for the defender; and on the third, the evidence, if there is any, is of such a nature, that it appears to me there ought to be a finding upon it also for the defender.

Every deed is held to be good; but it may be reduced if it is clearly proved that the maker of it was ill of the disease of which he died, and that he died within sixty days, without having been at kirk or market. But here there is no proof of the illness: it is only proved that he had gravel; but he was going about the doors.

The only question, therefore, is, whether the date is false? There has been evidence on both sides; but the evidence of the instrumentary witness called for the pursuer, only raised a presumption that the deed was not signed on the 2d.

An instrumentary witness may legally be called to prove what took place at the time of signing a deed, but his evidence, when it differs from the deed, is to be considered in reference to a solemn deed regularly executed. In addition to this, in the present case there is a distinct witness, and three documents

which ascertain the date of the deed to be correct.

ERSKINE  
v.  
ERSKINE.  


What appears decisive in this case is, the presumption that a deed is executed of the date it bears—the evidence of the writer as to drawing the deed, and filling up the testing clause—the charge for the stamp, and the expences attending the deed—and the receipt dated on the 3d, for the sum so charged.

It appears to me that the deed is verified; and if that is your opinion, you may find for the defender on the second Issue also.

If you find on these for the defender, I wish you to state in terms, that Erskine was of sound mind, and that there is no proof that he died of the disease of which he was ill at the time of signing the deed.

**Verdict.**—The Jury found that Erskine was of sound mind, and capable of understanding the nature of the deed—that the deed was signed on the 2d August—and that it was not proved, that at the time of subscribing, he was ill of the disease of which he died.

*Cay* for the Pursuer.

*Cockburn* for the Defenders.

(Agents, *John Johnston, junior, S. S. C., and Hotchkiss and Tytler, w. s.*)

PATERSON  
v.  
RONALD.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1820.  
Jan. 31.

PATERSON v. RONALD.

Costs refused,  
where the  
claim was for  
reparation of a  
loss, and a ver-  
dict returned  
for 1s.

THIS was a case tried at Glasgow, on the 13th September 1819, on an Issue whether a partnership was entered into, and whether the defender refused to implement, or untimously and unjustifiably withdrew from the partnership, to the loss and damage of the pursuer.

The Jury found one shilling damages.

*Cockburn* and *Maitland* moved for expences to the pursuer, as the verdict was important, by finding that the contract existed; and stated, that it was the general understanding, that the smallest damages carry costs; and referred to a case in the Court of Session, where L.10,000 were claimed, and only L.5 given, and where expences followed. Expences were also given in *Finwick's* case (Vol. I. p. 255); and in *Millar's* (Vol. I. p. 55, n.)

*Forsyth*, for the defender, opposed, and stated—Giving expences is matter of discretion; Hepburn's case (Vol. I. p. 267). We in fact gained our case, and are entitled to expences. A shilling in England may carry costs, but that is when the verdict establishes a right of property.

PATERSON

v.  
RONALD.

LORD PITMILLY.—This case was tried before me; and there was very little discussion as to the existence of the contract. The question was substantially one for damages. It was not, however, a claim of damages for loss of character, or injury done, but to get an equivalent for the profit the pursuer would have made, had the partnership been completed. The result was, a verdict for one shilling; and I did not find fault with the verdict.

The question now before us is, whether a person claiming damages to repair an actual loss, and getting only one shilling, is entitled to his expences. This must, of course, be decided by the law of Scotland, and as it would have been decided in the Court of Session. The cases referred to on the one side, were for reparation of character, and where the object was to obtain a verdict. The case put on the other side is one to establish

PATERSON  
v.  
RONALD.



a right of property. These all differ in principle from the present, which is one of alleged loss; and the question is, whether we are to extend to this case, the principle applicable to the others.

LORD CHIEF COMMISSIONER.—I am most anxious to decide this, and all other cases, according to the law of Scotland; and by that law, and in the Court of Session, expences is matter of discretion; but no Court can decide by discretion, without founding that discretion in sound principle. It is contended, that, in the Court of Session, damages carry costs; but that, as stated, is too extensive. My view of the present case is, that damage or not was the single question for the Jury. The question then is, upon what the claim of damage rests? The claim is for damage to repair a loss—not to repair an injury or an affront; and the claim being for L.2500, while the Jury give only 1s. I must hold it a case brought without a sufficient cause of action. If there is no rule to the contrary in the Court of Session, I must come to the conclusion, that there should be no expences.

LORD GILLIES.—I agree entirely, both in the principle laid down, and the conclusion drawn from it. In matters of this sort, a

Court must form precedents where it has none to guide it. There are fewer here than might have been expected, but that arises from the infrequency of such actions. The object of law is to protect property and persons from real, not imaginary injuries.

PATERSON

v.

RONALD.



There may be cases of nominal damages where costs ought to follow; but that is not the case in the present instance.

LORD PITMILLY.—I should be sorry to lay it down as a general rule, that expences should follow when 1s. damage is given for loss of property. My difficulty in this case was the want of authority; but I think we are entitled to draw the distinction pointed out, and to say that no expences ought to be given in this case.

Both motions were dismissed.

*Cockburn and Maitland for the Pursuer.*

*Forsyth for the Defender.*

(Agents, *E. Lockhart, w. s.* and *Jo. Grainger, w. s.*)

HACKNEY  
v.  
DAGGERS.

PRESENT,  
LORD CHIEF COMMISSIONER.

1820.  
Feb. 20.

HACKNEY v. DAGGERS.

Damages for  
assault and de-  
famation.

THIS was an action for assault and defama-  
tion, in which the defence was an accusation  
that the pursuer was the aggressor.

The first witness called was David Craik,  
constable at Portobello, who was cited by  
the name of Craig.

The LORD CHIEF COMMISSIONER ob-  
served—The description of constable at Por-  
tobello, I think sufficient to enable you to  
find him out;—*idem sonans* is the rule in  
such a case.

A person who  
had been con-  
sulted about a  
case, an incom-  
petent witness.

Another witness, on his examination *in in-  
itentialibus*, admitted that he had been at a con-  
sultation about this case with Mrs Hackney,  
and Mr Dick the agent—that Mr Dick  
shewed him the summons, which he approved  
of—that he told Mr Dick he had seen what  
took place, and thought an action should be



brought, but was not present at the precognition.

HACHNEY  
v.  
DAGGERS.

*Cockburn*, for the defender, took the objection of agency.

*Jeffrey*, for the pursuer.—It is a question for the Jury, whether they will believe him.

LORD CHIEF COMMISSIONER.—The tendency of my mind is to allow objections of this sort to go to the credit rather than the competency of a witness; but if agency is proved, it is an objection to receiving the witness.

If there was a *penuria testium*, I should be disposed to admit the witness *cum nota*, and leave Mr Cockburn to seek for redress; but as it is, I reject him, leaving Mr Jeffrey to apply for redress.

*Jeffrey* opened the case, and stated the facts.

*Cockburn*.—This is a short, simple, and silly case. It is not proved which party began, and the pursuer has not proved any injury.

LORD CHIEF COMMISSIONER.—If you

HACKNEY  
v.  
DAGGERS.



find the second Issue proved, it forms a defence to the action; but if you think the defender struck first, you must find damages.

On the evidence you must dispose of the case, though it would have been much better if the action had not been brought. The question of costs the Court dispose of, not the Jury.

Verdict—" For the pursuer, damages  
" L.25."

*Jeffrey* for the Pursuer.

*Cockburn* for the Defender.

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PRESENT,

LORD CHIEF COMMISSIONER.

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1820.  
Feb. 28.



Damages  
against the  
proprietors,  
&c. of a stage  
coach, for in-  
jury done by  
the negligence  
or improper  
conduct of  
their servants.

GUNN v. GARDINER, &c.

AN action against the proprietors of a stage-coach, and the guard and driver, on account of the negligence, carelessness, or improper conduct of the guard and driver.

DEFENCE.—The coach was not overset by any cause for which the proprietors are liable.

## ISSUE.

GUNT  
v.  
GARDINER, &c.

“ Whether, on or about the 5th day of  
“ April 1816, the Telegraph coach was over-  
“ turned near Airdrie, in consequence of the  
“ negligence, rashness, or improper conduct  
“ of the defenders, or any of them, whereby  
“ the pursuer suffered severe bodily harm and  
“ damage?

“ Damages laid at L.500.”

In the beginning of April 1816, the Telegraph stage-coach was overturned, on the road between Edinburgh and Glasgow, near the inn at Airdrie, by going over a heap of stones on the road, opposite to a house which was building for Waddell, defender in the two following cases. The pursuer sustained injury, and brought the present action of damages before the Magistrates of Glasgow, which was brought into the Court of Session by advocacy.

When the letters of advocacy were given in evidence, it was objected, that they had not been produced in terms of the Act of Se-derunt; but no objection was taken to Mr Moncreiff calling a witness to produce them, and prove by whom the bill was presented.

A witness al-  
lowed to pro-  
duce a docu-  
ment not  
lodged before  
the trial.

GUNN  
v.  
GARDINER, &c.

Some witnesses having been called who knew little of the matter, and an objection being taken to one, that he was not in the list served upon the defenders,

**LORD CHIEF COMMISSIONER.**—I have long ago had occasion to say, that agents should consider, not how many persons know something of the matter to be tried, but with how few they can prove their case. In the present instance, a list ought to have been put into the hands of counsel, of the persons who sat upon the front of the coach, with their faces to the coachman—not of those who sat behind, with their backs to him.

Competent to prove facts to shew that a coachman was rash; but incompetent to ask a witness whether he is rash.

A witness was asked what sort of man the coachman was—whether he was given to drinking, or was rash; to which Mr Jeffrey objected.

**LORD CHIEF COMMISSIONER.**—You are entitled to prove the fact of his being drunk at the time; and the question will then arise, whether you are entitled to go farther. You may also prove facts which shew him to be rash; but you are not to put the question whether he is rash.

Incompetent to prove a statement by a witness who cannot attend the trial.

A witness, in the course of his examina-

tion, being asked what his wife said, the objection of hearsay was taken. A certificate was then produced, that his wife could not attend.

GUNN  
v.  
GARDINER, &c.

**LORD CHIEF COMMISSIONER.**—It has been ruled, that it is competent to prove what a dead witness said; but the principle has not been extended to a witness who cannot attend.

The objection was taken to a witness, that he was not in the list. As an apology, it was stated that the party was in Ireland, and that the agent did not know of the witness.

A witness rejected, as his name was not in the list served on the other party.

**LORD CHIEF COMMISSIONER.**—This is the most disagreeable ground upon which to reject a witness, but I cannot deal loosely with the rule. The party knew of this witness, and ought to have given notice to his agent. Allowing this witness to be called, would be saying, that any negligence in the preparation of a case can be cured by the interposition of the Court.

A witness was asked, on his cross-examination, whether, in his opinion, the driver was to blame?

**LORD CHIEF COMMISSIONER.**—That is the question the Jury are to answer, and it is

GUNN  
v.  
GARDINER, &c.

therefore incompetent, even on cross-examination.

*Rutherford* opened the case for the pursuer, and after stating the facts, said that he would prove negligence in the driver and guard, amounting to delinquency, for which the defenders were undoubtedly liable.

*Jeffrey*, for the defenders, stated—The form in which the case comes to trial tends to subject the defenders in this action to the whole damages, though the whole, or a great part of the blame, was in the trustees allowing the stones to remain on the road. The best way of doing justice is to give the portion of the damage which corresponds to our degree of negligence, if you think any proved. They have deprived us of a most material witness, by making the guard a defender.

*Moncreiff*.—Their argument, that they will not be entitled to relief, is law, not fact. The question before you is, whether, by the negligence or improper conduct of those who had the management of the coach, we have suffered a severe injury. It is said we ought to have called the road trustees as defenders; but this involves a nice question of law.

**LORD CHIEF COMMISSIONER.**—This is peculiarly a case for a Jury, and you ought to consider it by itself, and not in reference to any other.

GUNN  
v.  
GARDINER, &c.  


The law on the subject is, that proprietors of stage-coaches undertake to furnish every thing necessary as to horses and carriage, with proper persons to manage them. The proprietors are eventually liable for the misconduct of their servants. What will render them liable in the present case, is stated in the Issue.

It is a material circumstance in this case, that there was an immediate investigation into the cause of the accident, in which one of the defenders participated. This is always disadvantageous, as the witnesses, without the least intention, may state insensibly what took place at the investigation, instead of what originally happened.

The proprietors are not liable in cases of pure accident. You must therefore consider whether this was a case of pure accident, or whether it is a case of negligence or improper conduct. If the coachman was drunk, there is a clear ground of decision; but if not, there is no clear evidence of rashness. The question as to negligence may be applicable,

GUNN  
v.  
GARDINER, &c.  


not only to the servants, but to one, at least, of the defenders, who lived close to the place where the stones were on the road.

If you think the coachman not in a state fit to conduct the coach, or that his conduct was improper, you will find for the pursuer; but if you think the coachman was fit for the situation, and that the stones ought to have been removed by others, then you will find for the defenders.

The expence to which the pursuer was put, has not been proved, except to the extent of L.8 or L.9 to a surgeon; but, of course, the expence of living at an inn must have been greater than at home. Damages, however, ought always to be given with moderation, and not as a punishment.

**Verdict, for the pursuer, L.150 damages.**

*Moncreiff, Keay, and Rutherford, for the Pursuer.*

*Jeffrey and Cockburn for the Defenders.*

*Greenshields and J. A. Murray for Waddell.*

(Agents, *Æneas Macbean, w. s.* and *James Greig, w. s.*)



MACKAY, &c.  
v.  
WADDELL, &c.

PRESENT,  
LORD CHIEF COMMISSIONER.

MACKAY, &c. v. WADDELL, &c.

1820.  
Feb. 29.

AN action by the defenders in the above case, for relief from the claim of damages made against them.

Found in an action against road trustees, that stones were improperly allowed to remain upon a road.

DEFENCE for Waddell.—The stones did not encroach upon the road. Defence for the trustees.—Trustees are not liable, and gave no permission to lay down the stones. They were not on the metalled part of the road. The original action is founded solely on the culpable and improper conduct of the servants.

ISSUES.

“ Whether, on or about the 5th day of  
“ April 1816, the Telegraph coach was over-  
“ turned, near Airdrie, from the improper  
“ conduct of the defender Waddell, in laying  
“ down, and allowing to remain, improperly

MAGEAY, &c.  
v.  
WADDELL, &c.

“ and illegally, on the said road, a quantity  
“ of stones, or rubbish ? and,  
“ Whether the trustees did improperly and  
“ illegally allow the stones and rubbish to re-  
“ main on said road, whereby William Gunn  
“ suffered severe bodily harm and damage ? ”

Evidence in  
one case being  
held evidence  
in another,  
does not de-  
prive the pur-  
suer of his re-  
ply.

It was proposed that the evidence in the former case should be held evidence in this ; and a question being raised as to the pursuers' right to reply,

LORD CHIEF COMMISSIONER.—In this case, it appears to me that the pursuers must have a reply ; and as the grounds for subjecting the defenders are different, the one being held liable for laying the stones, the other for allowing them to remain, the best arrangement would be, that the counsel for the pursuers should open the case with a few observations ; then the counsel for both defenders be heard in answer, and then the counsel for the pursuers in reply. But there is some difficulty in the form, as I am not accustomed to actions of relief.

It was then agreed, that the evidence in the former case should be held evidence in this ; and that a few witnesses, in addition, should be examined for Waddell,

To one of the witnesses called, it was objected, that his name was not in the list.

MACKAY, &amp;c.

v.  
WADDELL, &c.

LORD CHIEF COMMISSIONER.—Lists, instead of being of use to forward the ends of justice, are a great abuse. In the lists yesterday, there were 290 names, and 20 called for the pursuer, and for the defender. If a proper selection had been made, the case might have been tried in half the time. I really wish gentlemen at the Bar, but particularly agents, would attend to this.

*Cockburn* opened the case, and contended —The pursuers were only found liable in the first instance; and there is no inconsistency in finding that the present defenders are liable, which was the view of the Court in sending the Issues. Even had the driver been drunk, if a person puts a stone before the wheel, which overturns the coach, that person is liable.

*Greenshields*, for Waddell, contended, that the Jury had already decided, that the injury was occasioned by the fault of the driver; and it cannot also be by the fault of Waddell. He was exercising a common right in building; and neither the trustees, nor the land-

MACKEY, &c. lord of the inn, ever complained. There was  
WADDELL, &c. sufficient roadway left.

*Moncreiff.*—In this case, the accusation is, that the injury was occasioned solely by the defenders. The verdict yesterday negatives this; and we must now hold that it was by the negligence of the pursuers. There are here a number of questions, both of law and fact. Were the stones upon the road? What is road at that place? Were the stones improperly laid upon the road? Are the trustees answerable for an improper act of another?

We shall maintain in the proper place, that the trustees are not liable for a nuisance laid upon the road by another person, and request either to have this point reserved, or the Jury directed to find for us. It is only for direct orders or permission to lay the stones that they are liable.

LORD CHIEF COMMISSIONER.—Would it not be better to have a special case, that this point may be decided? There is no written or express permission.

*Jeffrey.*—Reserving the question is the least expensive, as, if the verdict is for us, the question does not arise.

The only proof of the trustees knowing that the stones were there, is the testimony of one witness, which is not sufficient. Lord Fife's case, Vol. I. p. 124.

MACKAY, &c.

v.  
WADDELL, &c.

The testimony  
of a single wit-  
ness submitted  
to the Jury.

**LORD CHIEF COMMISSIONER.**—In that case, the question was, whether there were facts and circumstances sufficient to render the evidence of one witness conclusive. The Court said expressly, that we did right in submitting the testimony to the Jury; but that does not touch your case, as your object is to shew, that there are not facts and circumstances sufficient to support this witness.

*Moncreiff.*—There is no fact proved; and they might have had plenty of evidence, if the fact had been in their favour. Finding that the stones were on the road, is not a sufficient answer to the Issue.

*Jeffrey*, for the pursuers, maintained—  
1st, That the verdict did not bar the claim;  
and 2d, That the stones were upon the road. If it had been on the private road to the inn, the case might have been nice; but here it was not. The trustees are liable, whether they knew it or not, as they ought to have

MACKAY, &c. known, and their surveyor was frequently  
v.  
WADDELL, &c. there.

It is not inconsistent to find us entitled to complete relief. There are many contracts, even, in which a party is primarily liable to another, though he is entitled to complete relief from a third party.

**LORD CHIEF COMMISSIONER.**—The question yesterday was of importance to the public; but the case to-day, especially the second Issue, is much more important; and I am happy that there has been so much ability in the argument from the Bar; that the case has met with so much attention from you; and that we have had time to reflect upon it.

The first point stated for the defenders is, that any verdict you can give for the pursuer, will be inconsistent with the verdict yesterday.

My mind is very easily made up on this point; for the Issues in the former case are not exclusive; and by finding for the pursuer, you have not excluded the question of relief. The Issues in the former case were approved of by the Court of Session, and they must have had the actions of relief under consideration at the time. My opinion is,

that there is nothing in the proceedings to prevent you finding what is warranted by the evidence. We are here to find facts which are to be returned to the Court of Session; and I am clearly of opinion, that that Court would be much disappointed if the case was returned without any finding.


MACKAY, &amp;c.

v.  
WADDELL, &c.

The first question in both the actions of relief is, whether the stones were on the road; and this is a question of law and fact; but the law is easy, as it arises from the fact. Those of the Jury who saw the ground, will know what is road; and even from the plan it may be seen. By the Act of Parliament for making this road, the trustees are entitled to make the road 60 feet wide, but there is nothing binding them to metal the whole. Near the place in question, the open space is 62 feet wide, and it is afterwards reduced to 40 feet. My opinion in law is, that the trustees being entitled to take 60 feet for a road, wherever that space is left open, we must hold it to be road; and the question for you to answer is, whether the stones were laid within these 60 feet.

Having determined whether they were upon the road, the next question is, whether they

MACKAY, &c.  
<sup>v.</sup>  
WADDELL, &c.



were laid there by Waddell; and the third, whether they were improperly laid.

The argument that we are to take the custom of the country as sanctioning the laying down the materials, is important in this branch of the case. The custom seems to be in favour of what was done; but if materials are laid down, they must be laid with common care and attention, and in such a way as not to be liable to be turned out of their place by others. If you are of opinion that they were properly placed, you may find that they were placed, but not improperly. You will, however, attend that they were near the metalled part of the road, and might with very little difficulty have been placed elsewhere.

It was said the question was, whether the stones were the cause of the accident; but that is not the proper manner of putting it. There is a great difference between *the* cause, and *a* cause; and I am of opinion, the Court of Session wished to know whether they were *a* cause of it. There is no doubt the coach was overturned by running upon the stones, and that it might have avoided them; but we have no evidence to shew that the coach would have been overturned if the stones had not been



there, and we must presume that it would not.

MACKAY, &c.  
v.  
WADDELL, &c.

If you think they were not on the road, or were not improperly laid upon it, or were not a cause of the accident, then the next question does not arise.

*2d Issue.*—This involves a most important matter of law, as it refers to all road trusts in the kingdom; and I should be sorry if we could not put this case in a proper shape to have the question tried. The question turns upon the evidence, and upon your opinion whether the trustees allowed the stones to remain, and whether they allowed them improperly to remain,

There is only one direct witness to the fact of the trustees knowing the stones were there; the evidence is not of the highest degree, and the witness does not prove direct knowledge. I do not, however, think myself entitled to withdraw this evidence from you; and Mr. Moncreiff, if he thinks this direction wrong, may have his redress, either by an application for a new trial, or by Bill of Exceptions.

I shall not decide whether trustees are bound to know what is upon the road; but I think the law is in such a state as to make it proper for me in this case to submit the evi-

**MACKAY, &c.**  
**WADDELL, &c.**  
dence to you; and one can hardly suppose the stones were there for weeks without the trustees knowing it. The presumption is, that they were seen by the trustees, as well as by the surveyor; and his seeing them, and having communication with the trustees, is an additional circumstance; but you must still consider the weight due to the testimony. There is an article in the defences (reads it), which shews that they knew something of the matter, and that the surveyor acted upon the knowledge of it. You may, if you choose, find a special verdict, but if you prefer it, you are at full liberty to return a general finding.

Verdict—"The Jury found that the trustees improperly allowed the stones to remain on the road for two or three weeks; that the Telegraph coach, by coming in contact with them, was overturned, whereby William Gunn suffered severe bodily harm. But whether upon the whole," &c. (in the form of a special verdict).

*Jeffrey and Cockburn for the Pursuers.*

*Moncreiff, Keay, and Rutherford, for the Trustees.*

*Greenshields and J. A. Murray for Waddell.*

(Agents, *J. Greig, w. s. Dallas, Innes, and Hogarth, w. s. and John Meek, w. s.*)

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PRESENT,  
THE LORD CHIEF COMMISSIONER.  
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SHARP  
v.  
WADDELL.  
~

SHARP v. WADDELL.

1820.  
Feb. 29.  
~

AN action of relief by the road trustees against Waddell.

Found that stones laid on a road were a cause of the overturn of a stage-coach.

DEFENCE.—The stones were laid on the property of the defender. There is no claim in the original action against the pursuer, and therefore there can be no claim of relief.

#### ISSUES.

“ Whether, some time previous to the 5th  
“ day of April 1816, the defender, or person’s  
“ in his employment, did lay down and place,  
“ or cause to be laid down and placed, with-  
“ out leave or authority, or right so to do, a  
“ quantity of stones or rubbish, or other ma-  
“ terials, upon the turnpike road betwixt  
“ Edinburgh and Glasgow, where the same  
“ passes through the town of Airdrie, in the  
“ county of Lanark ?

“ And whether, on or about the night of

SHARP  
v.  
WADDELL.



“ the 5th day of April aforesaid, after it was  
“ dark, the stage-coach called the Telegraph,  
“ the property of John Mackay, James Scott,  
“ and Peter Campbell, coach-masters in Edin-  
“ burgh, and others, was overturned upon  
“ the said road at the time and place afore-  
“ said, in consequence of the stones so laid  
“ down as aforesaid, whereby William Gunn,  
“ quarter-master in the 78th regiment of  
“ foot, being a passenger in said coach, time  
“ and place aforesaid, suffered great bodily  
“ harm ?”

LORD CHIEF COMMISSIONER, (*To the Jury*)—The former verdict did not find that the defender had a right to lay the stones where he did, and therefore, I suppose, on the first Issue you will find for the pursuer. The other you have already determined.

*Greenshields*, for the defender, submitted that they could not find he had no right to do so, when it was sanctioned by the custom of the country ; but agreed that the second Issue was settled.

*Moncreiff*, for the pursuer.—They have found that the trustees were wrong ; and I do not know how to reconcile that finding with the other part of their verdict.

Verdict—"The Jury found that Waddell  
 "laid the stones on the road—that the coach  
 "was overturned—and that the stones were  
 "a cause of the overturn, whereby Gunn suf-  
 "fered bodily harm."

SHARP  
 v.  
 WADDELL.

On the 8th February 1820, a motion was made to change the place of trial of the action of relief.

Consent of parties necessary to try two cases by the same Jury.

*Keay*, for the trustees.—We are not anxious to change the place of trial, but to have the action, in which we are defenders, superseded till the principal action is disposed of. We object to the competency of the action against us. It falls, if, in the original action, no damages are found due; or if they are found on account of the negligence of the defenders.

*Cockburn*, for the pursuer.—The same motion was rejected by Lord Alloway in the Court of Session. We maintain that there was no negligence; but even if there was, it would have done no harm if the stones had not been improperly laid upon the road. The cases must be tried by the same Jurymen, though not, perhaps, at the same moment. It is now too late to discuss the competency of the action.

SHARP  
v.  
WADDELL.

*Moncreiff*, for the trustees.—We cannot be held liable for all nuisances laid upon the road. Questions of relevancy are of great importance, and a Bill of Exceptions at the trial is not the proper manner of trying them.

LORD CHIEF COMMISSIONER.—I had some doubts as to the competency of now discussing the relevancy. If this was a case which was to regulate practice in any material degree under the statute 1819, I should have wished the assistance of my learned brothers; but I am clearly of opinion, that it does not regulate any general rule of practice; but that this is an insulated case, and to be decided on its own grounds, and by what is justice to the parties.

Our power as to the relevancy is provided for by the statute 1819. Till then we had no power of getting quit of a case, except by trial, or by the party not appearing. In the circumstances of the present cases, it is impossible for me to stop the trial; and the only question is, will justice be done by trying them in the order in which they are set down? It appears to me that they are in the proper order, and that Gunn's case ought first to be tried, and then the actions of relief. If they

had been set down in a different order, it might have been necessary to make a change ; but it is a mistake to think the Court can compel the parties to try the actions by the same Jury. It may be the same pannel, but it is only by consent that they can be tried by the same individuals.

SHARP  
v.  
WADDELL.

At the trial the parties consented that they should be tried by the same Jury.

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PRESENT,

LORD CHIEF COMMISSIONER.

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MACKENZIE v. HENDERSON.

1820.  
March 8.

DAMAGES for breach of bargain, by furnishing unmarketable herrings, and of a different year's curing from that marked upon the casks.

Damages for  
furnishing un-  
marketable  
herrings.

DEFENCE.—A denial of the allegations.

ISSUE.

“ Whether of 145 barrels of herrings ad-

MACKENZIE  
HENDERSON.

“ mitted to have been sold and delivered to  
“ the pursuer at Inverness, in the year  
“ 1815, by James Lyon of Inverness, mer-  
“ chant, admitted by the defender to have  
“ been his, the defender’s agent, at the price  
“ of 28s. per barrel, and warranted by the  
“ said James Lyon to be well cured, and to  
“ be fish caught and cured in the season of  
“ 1815; seven barrels admitted to contain  
“ fish of the season aforesaid were ill cured,  
“ and 115 barrels contained fish not caught  
“ and cured in the season aforesaid, or were  
“ ill cured, or were in an unmarketable con-  
“ dition.”

The herrings had been furnished to the pursuer by Mr Lyon of Inverness, acting for the defender. Upon the representation that the herrings were bad, they were examined by inspectors, who swore to their report. Mr Lyon took back the herrings, and paid some expence that had been incurred; but the defender disapproved of his conduct, and disputed the allegations of the pursuer.

A witness fined  
for not attend-  
ing a trial.

When the case was called, Mr Cockburn stated that a witness was absent who did not choose to come.



**LORD CHIEF COMMISSIONER.**—You must call the witness, and shew that he is a material one, and the Court will then punish him for a contempt.

MACKENZIE  
v.  
HENDERSON.

The witness having been called, his Lordship said he had no hesitation in imposing a fine of L.5, subject to deduction if he had a good excuse to offer.

The second witness called was one of the inspectors.

*Jeffrey*, for the defender, objects.—He was unnecessarily examined upon oath, and is not a free witness ; the case is different from an oath in judicial proceedings.

A person formerly examined extra-judicially upon oath, admitted as a witness.

*Cockburn*, for the pursuer.—The only question is, if he is inadmissible. The oath was necessary, and is matter of every day's practice. He was appointed inspector by the *defender*.

*Jeffrey*.—He was appointed by Lyon without any authority. The report, or at least the oath, was *ex parte*.

**LORD CHIEF COMMISSIONER.**—I feel considerable diffidence in deciding when the Scotch rules of evidence are involved. The question here is, whether this objection goes

**MACKENZIE**  
v.  
**HENDERSON.**

to the competency or credit of the witness. In my opinion, it goes to his credit, which is matter for the consideration of the Jury; and now that a full cross-examination is allowed, they will have much better means of ascertaining the credit due to him.

Taking voluntary affidavits is a great abuse. In England, Lord Kenyon was of that opinion; and the present Lord Chancellor stated, that though it was the constant practice, it bordered on illegality.

Incompetent  
 to ask a witness  
 what he  
 formerly  
 swore.

After the witness had been examined, it was proposed to produce the affidavit, but the objection was taken that it had not been lodged eight days before.

The LORD CHIEF COMMISSIONER, after discussion, was satisfied that it was incompetent to ask a witness what he had formerly sworn, and stated that he must sustain the formal objection, if persisted in.

An objection was taken to a witness, that he was called to prove facts as to a different quantity of herrings.

LORD CHIEF COMMISSIONER.—If this witness is not to prove more than the last, the evidence is inadmissible; for we do not sit

here to try whether Dr Henderson was in the habit of furnishing a bad article.

MACKENZIE  
v.  
HENDERSON.

Mr Lyon was called as a witness for the defender.

*Cockburn* objects.—He is interested, as we have an action of relief against him.

*Jeffrey*.—He has clearly no direct interest in this case. The interest of the witness is against us.

An action against a witness on the same facts, does not disqualify him, unless the verdict can be used in evidence against him.

LORD CHIEF COMMISSIONER.—It is a mistake to call the action an action of relief; it is an action of damages brought against the witness, on account of his conduct as to these herrings. The rules on this subject are general, and are intended to forward the ends of truth and justice. The question here is, can the verdict in this case be given as evidence for or against him in the other case?

*Jeffrey* contended, that the pursuer having kept the herrings for two months, was not entitled then to object to them. It was the statement, that the defender had attempted a fraud, by altering the brand, which made it necessary for him to push this case to trial.

*Matheson*, in opening the case, and *Cock-*

MACKENZIE  
<sup>vs.</sup>  
HENDERSON.



*burn* in reply, stated the facts, and maintained, that the herrings could not have been well cured, from the state they were in so soon after; and that no want of care in the pursuer could have occasioned their being in that state.


LORD CHIEF COMMISSIONER.—As the case returns to the Court of Session to be there disposed of, our duty is merely to find what you think proved, after due consideration of the evidence. We are to attend to the terms of the Issue; and the main question is as to the 115 barrels; there was an attempt to throw a doubt upon their identity, but it rests entirely in argument.

A witness swore that all the herrings cured in 1814 were sold some time before; and if you believe him, you must find that the herrings in question were not caught that year. But I must also submit to you, along with this positive evidence, the inference drawn by the inspectors from the appearance of the herrings. My opinion however, is, that more reliance ought to be placed on the positive evidence of a disinterested witness speaking to a fact, than on an inference drawn by others, however skilful.

If the herrings were unmarketable, that

may have arisen either from bad curing or bad keeping; and in reference to this point, it is necessary to look at the evidence of the curers and inspectors in connection. All that is necessary in law is, that an article be in good condition at the time of delivery; but when not examined at the time, an inference may be drawn as to its condition at that time, from its condition afterwards.

MACKENZIE  
v.  
HENDERSON.



You have evidence that they were well cured; you have also evidence of the state they were in at the end of two months; and you have the opinion of the inspectors, that if well cured, they could not have been in such a state in so short a time. You must say whether you think the evidence of good curing sufficient to counterbalance the other evidence, and find according to your opinion; but I think the better course for you, is to find, whether the state they were in was occasioned by want of care in the curing or keeping.

Verdict.—1st, “That the seven barrels containing herrings caught in 1815, were ill cured. 2d, Find that the 115 barrels contained herrings caught in 1815. 3d, Find that the 115 barrels herrings were ill cured.

MACKENZIE  
v.  
HENDERSON.

"4th, Find that the 115 barrels herrings  
"were on that account in an unmarketable  
"condition."

*Cockburn and Matheson* for the Pursuer.  
*Jeffrey* for the Defender.

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PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1820.  
May 15.

New trial re-  
fused.—  
Grounds of the  
motion *res no-*  
*viter* and sur-  
prise.

*Jeffrey* moved for a rule to shew cause why the 1st, 3d, and 4th findings of the verdict should not be set aside, as contrary to evidence. We proved the herrings to have been well cured, and to have been of the fishing 1815, which were the only points. Even now, at the distance of years, they are not so bad as the herrings described by the witnesses.

LORD CHIEF COMMISSIONER.—The Issue is *or*, not *and* well cured; and the Jury went upon the ground (and it appears to me a sound one), that the state they were in in November, proved that they had not been well cured. It does not, however, interfere with your ground of application, which appears to me to be more properly surprise, than that

the verdict is contrary to evidence. It is not every surprise which will be the ground of a new trial; and this ought to be verified by affidavit. It appears to me a nice question, but that we ought not to cut you out of your rule, upon a proper affidavit being produced.\*

MACKENZIE

v.

HENDERSON.

*Cockburn.*—There is no ground for the new trial. The verdict is not contrary to evidence; and there was no surprise. He knew from the first that we were to prove the herrings bad.

LORD CHIEF COMMISSIONER.—He may say this is *res noviter*. We are not here to go into the merits of the case, but merely to say whether we think the defender has laid sufficient grounds for us to grant a new trial.

*Jeffrey.*—They did state that the herrings were bad, but coupled it with an allegation, that they were cured in some former year. Being prepared to prove them cured in 1815, and well cured, we perhaps paid too little attention to the state they were in. The evidence was contradictory; but the direct evidence was for us. The defender is so anxious to

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\* In answer to a question from Mr Jeffrey, his Lordship stated, that an affidavit by the agent would be sufficient.

MACKENZIE  
v.  
HENDERSON.

clear his character, that he is willing to pay into Court any reasonable sum, as the expence of the new trial.

LORD CHIEF COMMISSIONER.—We require to be cautious, as this is the first instance in this Court, where we have had occasion to decide upon an application of this nature. If we felt any room for doubt, we would take time to deliberate, as our decisions must form the law upon a subject which is new here, though well established in England. The application is made on two grounds; 1st, That the verdict is contrary to evidence; and an attempt is made to couple with this, an offer of farther evidence. 2d, Surprise.

It was correctly stated, that there were two points in the Issue, the time of curing, and whether the herrings were well cured; and it has been maintained, that the Jury had gone upon inference, not on direct evidence. It is quite clear that the whole evidence was fit for the consideration of the Jury. It is not said there was any misdirection on the part of the Court. The Jury considered the whole, and have found a verdict in conformity with the evidence, and without partiality to either party. This brings the



case to a question of surprise, or *res noviter*.

MACKENZIE  
v.  
HENDERSON.

On that ground we ought to attend to whether the evidence was designedly kept back, or was not produced through negligence or mistake.

The defender had always a power of inspecting the herrings, and might have done so before the trial. I am sorry that any thing should occur here which may hurt the feelings of a person, who, I dare say, is of excellent character; but I think any imputation thrown upon him will be rebutted by the observations of his counsel. We cannot, however, grant a new trial to repair the injury done to his feelings, or to enable him to rectify a mistake into which he may have fallen, as that would give rise to carelessness in the conducting of causes.

If the evidence was designedly kept back, then, by all the rules and principles of justice, it is no ground for a new trial.

Was there any impossibility of discovering this till after the trial? It appears from the whole proceedings, that the defender had full warning on the subject; and it was the duty of him and his agents to have made the

MACKENZIE  
v.  
HENDERSON.

necessary inquiry. But I wish to hear the opinion of Lord Pitmilley.

LORD PITMILLY.—I most completely concur in every one word stated by your Lordship.

The ground of the application is, that the pursuer resorted to a sort of evidence, which, though competent, the defender did not foresee, but that is a bad ground to rest upon. The evidence was competent, natural, and proper; and it would be very dangerous in us to grant a new trial, on the ground that the party did not come prepared to meet evidence of the description I have mentioned.

1820.  
June 1.

A verdict in substance for the pursuer, carries costs.

*Cockburn* moves for expences.

*Horne* objects.—The pursuer suspended as to the whole, but afterwards admitted he was wrong as to 20 barrels.

LORD CHIEF COMMISSIONER.—In this case damages were found, and, in substance, a verdict for the pursuer. There must be an order for expences; but if there is any article to which the defender objects, he will have an opportunity of being heard, and of stating all his reasons before the auditor.

PRESENT,  
THE THREE LORDS COMMISSIONERS.

MACKENZIE  
v.  
HENDERSON.

When the auditor's report was returned, *Jeffrey* objected, and stated that he was not only entitled to deduction from the sum claimed, but was entitled to expences, as he was successful on the most material Issue.

*Cockburn*.—It is most desirable to have a general rule; but at present we wish for justice, according to the old rules, whether they are the best or not; and being successful in the subject in dispute, we must have costs.

LORD CHIEF COMMISSIONER.—This is an application for costs, which is resisted by the defender, on the ground that one Issue was found against, and two for him. In the case of *Guthrie and Kirk* (Vol. I. p. 280), the Court did not give full expences; but that was by no means the same as the present case. There the Issues were upon different causes of action.

We are not to lay down any new rule in this case. We consider that here is a verdict, and that the pursuer is entitled to have the expence to which he was put in obtaining it.

MACKENZIE

v.

HENDERSON.

I should be happy if expences were regulated by statute, or by Act of Sederunt; but the Court are unanimously of opinion in this case, that the usual rule must be followed.

PRESENT,

LORD CHIEF COMMISSIONER.

1820.  
March 13.

YOUNG v. ALLISON.

Damages for  
assault and  
battery.

AN action of damages for assault and battery.

DEFENCE.—A denial of the charge.

ISSUE.

“ Whether, on or about the 25th day of  
 “ June 1818, the defender did enter the  
 “ garden possessed by the pursuer at Spring-  
 “ field, Leith Walk, in the county of Mid-  
 “ Lothian, and did violently assault, strike,  
 “ and kick the pursuer, to the injury and  
 “ damage of the said pursuer? Or, Whether,  
 “ time and place aforesaid, the pursuer first

“ assaulted the defender, by striking him, or  
 “ by twisting his cravat or neckcloth ?  
 “ Damages laid at L.500.”

YOUNG  
 v.  
 ALLISON.

After opening the case, the counsel for the pursuer stated, that there was a surgeon in attendance, to whom it was of consequence not to be detained ; it was therefore proposed to call him first, to describe the wounds.

In an action for assault and battery, a *prima facie* case must be made out, before calling evidence as to the nature of the injury.

LORD CHIEF COMMISSIONER.—You must first lay the foundation, by proving the injury. The moment you have done this, you may call the surgeon..

All I wish is, that a *prima facie* case should be made out ; and even when that is done, the Jury are not to hold the hurts described by the surgeons as inflicted by the defender, but as hurts which may be proved to have been occasioned by him.

When the second witness to the facts in the garden was called,

Moncreiff, for the defender, objects.—He is nephew to the pursuer.

A nephew an incompetent witness, there being no *penuria testium*.

M'Lean, for the pursuer.—There has been a gradual relaxation of the law on this subject. There is here a *penuria testium*, which

YOUNG  
v.  
ALLISON.

renders him admissible.—Ersk. IV. 2. 24. In M'Neil's case, the witness was admitted *ad civilem effectum*.—Moncreiff, 30th Nov, 1716; Brown, 20th Nov, 1786, M. 16,778.

LORD CHIEF COMMISSIONER.—There is no doubt that the law will relax in certain cases; but the first thing to be made out is, that there is a *penuria testium*. I cannot say what may be behind in this case; but it is admitted that this was not an occult transaction, but in the open air, when all the King's subjects might have been present. There was no secrecy in the facts, and there is one witness (the servant) who may undoubtedly be called. You cannot object to him, that he will not state the fact as you wish it; and I cannot decide that there is a *penuria*, when it is admitted that he was present. Two witnesses are necessary by the law of Scotland; and I cannot hold that the one you have called, along with the evidence of the surgeons, is sufficient. If you call another witness, and get your fact from him, it will be a case to go to the Jury; but at present it is not.


The servant and another witness were then called, and the case opened for the defender,

LORD CHIEF COMMISSIONER.—It is of

importance to ascertain whether the servant came into the garden for a lawful purpose; and there seems to have been a practice in his favour. On the question of assault, there is no doubt that a person seeking reparation must come into Court pure; for if there is provocation, though greatly less than what is returned, it is a justification: if the fist is held up in a threatening manner, or the body touched in a particular way, or the neckcloth twisted, it is a justification; and these are the facts to be tried on the evidence as it stands. . It is said, I ought to have admitted other witnesses; but there is a rule of law against it; there is, however, another rule, which entitles me to submit the evidence of one witness to you, as there are now other facts and circumstances proved. You are, therefore, to consider the evidence of the girl, and decide whether the assault was by the pursuer or defender; and in coming to a conclusion on this subject, you will consider whether any means were taken by the pursuer to improve the memory of the witness; and also, whether she had the best means of observing the facts; and whether she is contradicted by another witness.

The material fact here is, whether the blow

YOUNG  
vs.  
ALLISON.



YOUNG  
v.  
ALLISON.

by the defender, or twisting the neckcloth by the pursuer, first took place. But I have perhaps gone too much into detail in such a case as the present.

Verdict—"For the pursuer, damages £25."

*Sandford and Maclean* for the Pursuer.

*Moncreiff* for the Defender.

(Agents, *D. Fisher and James Balfour.*)

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PRESENT,

LORD CHIEF COMMISSIONER.

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1820.  
March 14.

CAMERON v. CAMERONS, &c.

Damages for  
arresting the  
stocking on a  
farm.

DAMAGES for arresting the pursuer's stock on a farm, for payment of rent, subsequent to an offer of payment to the factor of the proprietor.

DEFENCE.—The pursuer's conduct rendered the arrestment necessary; and the defenders did not use it maliciously.



## ISSUE.

CAMERON  
v.  
CAMERONS, &c.  


“ What loss and damage the pursuer has  
 “ suffered, in consequence of the sequestration  
 “ executed, or caused to be executed by the  
 “ defenders, on or about the 6th day of Fe-  
 “ bruary 1817, upon the farm of Lundavra,  
 “ rented by the pursuer from the defenders,  
 “ for the sum of L.18. 13s. 8d. as one year’s  
 “ rent of said farm.”

The LORD ORDINARY found damages due, and sent the case to the Jury Court to ascertain the amount.

The first piece of evidence was a passage from a letter. Mr Clerk, for the defenders, wished the whole letter read.

LORD CHIEF COMMISSIONER.—In this case, I understand Mr Clerk to say, that the whole is necessary to understand the passage relied on by the pursuer. In the practice to which I have been accustomed, when a part of a letter was given in evidence, the whole was read at the time it was given in, if, as in the present case, the opposite counsel wished it.

When part of a letter is given in evidence, the whole letter ought to be read, if the opposite counsel thinks it necessary to the understanding of the passage given in evidence.

The first witness for the pursuer was asked

CAMERON  
v.  
CAMERONS, &c.

if a sequestration being laid on, was injurious to a tenant; to which Mr Clerk objected.

LORD CHIEF COMMISSIONER.—It appears to me, that it is not fit to prove a self-evident proposition. It is quite competent, however, for the pursuer to prove any actual loss he has suffered, and for the defenders to shew, that in the particular circumstances of the case, the sequestration was not injurious.

A witness, on cross-examination, referred to a letter, and was allowed to look at it to refresh his memory.


Incompetent  
by parol evi-  
dence to prove  
the contents of  
a receipt.

The witness was then asked as to a receipt given for rent.

LORD CHIEF COMMISSIONER.—You ought to have given them notice to produce the receipt, before giving evidence of its contents. The question is irregular on another ground, as you now state there is a witness who is to produce the receipt.

*Jeffrey*, for the pursuer.—This is a case peculiarly fitted for a Jury, as the damage is not to be ascertained by calculation, but by a fair estimate of the injury done by a se-

questration, Saying a man is bankrupt subjects in damages, and this is much stronger.

CAMERON  
v.  
CAMERONS, &c.  


*Clerk*, for the defenders.—The whole proof in this case has been for the defenders. The sequestration was laid on before the rent was paid, and you therefore cannot find damages. Though damages are found due by the Lord Ordinary, yet, as none have been proved, you cannot find any. *Clark v. Thomson*, (Vol. I. p. 187.) He has not proved that he had any credit to lose.

LORD CHIEF COMMISSIONER.—From the turn this case has taken, it is important for you, and particularly for me, to consider the interlocutor of the Lord Ordinary, on which this Issue is founded. It is said that you are not entitled to give damages, as none have been proved; and reference is made to the case of *Clark and Thomson*; but there the claim was for an actual loss. In every question of account, the doctrine there laid down applies, but it does not apply to the claim for *solatium*. I must take the Issue and interlocutor as they stand, and together. If no damages are proved, you cannot find them; but there is a claim for *solatium*, and you must

CAMERON  
v.  
CAMERONS, &c.

consider what evidence there is of the injury to the mind and feelings.

The chief part of the case depends on the parol testimony, which proves the offer of the rent both in Edinburgh and the country. So that the real object of the sequestration appears to have been, not to get the rent, but to get quit of the tenant. This is not a question of patrimonial loss, but solatium; and you are to consider what, under all the circumstances, is an indemnification for what the pursuer has suffered. Questions of this sort ought always to be considered with moderation, and not with a view to punish the defenders, but to repair the injury to the pursuers.

Verdict, "For the pursuer, damages L.50."

*Jeffrey* for the Pursuer.

*Clerk* for the Defenders.

(Agents, *J. B. Hyndman*, and *D. Cameron*.)

1820.  
Nov. 27.

Costs follow  
the verdict.

Mr Jeffrey moved, in presence of the three Lords Commissioners, for expences, which Mr Clerk opposed.

LORD CHIEF COMMISSIONER.—From the

commencement of this new Institution, I thought it most important that there should be some regulation on the subject of costs. Giving costs is no doubt a matter of discretion here, as it is in the Court of Session; but this Institution is borrowed from England, where costs are regulated by statute, and it is a *desideratum* whether we ought not to have a general regulation similar to theirs.

CAMERON  
v.  
CAMERONS, &c.  
—

When the condescendence and answers are reduced to a single sentence, and the parties go to issue upon this, and damages are found; if, on the question of expences, we are to hear the whole case argued again, it would be like trying the case again, and allowing a new trial on the ground of excessive damages. The manner practised in the Court of Session, of giving a slump sum for damages and expences, is impracticable here; and in the present case, I have not heard any ground to induce us to give expences subject to modification. I am not aware of any case in which this has been done, where the question, as in the present instance, was left to the Jury. Of all cases, this does appear to me one in which we ought not to deviate from the general rule followed since 1816. The order

**CAMERON** must be general, but the party may object to  
**CAMERONS, &c.** any charge he thinks improperly made.

PRESENT,

LORDS CHIEF COMMISSIONER AND FITZMILLY.

1820.  
 March 15.

**REID v. STODDART.**

Found that the purchaser of a share of a lottery ticket had abandoned his purchase.

**DAMAGES** for selling the one-sixteenth share of a ticket in the State Lottery, after it had been sold to Stoddart.

**DEFENCE.**—The purchase was not completed. Stoddart abandoned the purchase.

**ISSUE.**

“ Whether, upon the 19th September 1813,  
 “ the defender abandoned and gave up the  
 “ purchase of the one-sixteenth share of the  
 “ ticket No. 3934, in the State Lottery, ad-  
 “ mitted to have been purchased by the de-  
 “ fender from the pursuer, upon the 18th  
 “ day of September aforesaid ?”

On Saturday the 18th September, in Reid's

shop, Stoddart selected two shares of tickets in the Lottery, and put his name on the back of them, but did not pay for them. On the same evening, Reid's shop-boy sold one of these shares to Mr Harper. The mistake was not discovered till late at night, and Reid sent his shop-boy early the following morning to offer Stoddart his choice of the unsold shares.

REID  
v.  
STODDART.

The ticket having been drawn a prize, Stoddart applied to the Sheriff, who assoilzied Harper, but gave judgment against Reid for the amount of the prize, and for expences. This judgment was brought before Lord Pitmilley by advocacy, who sent the case to the Jury Court.

When a witness for the pursuer was called, an objection was taken to his admissibility.

*Jeffrey* for Reid.—I admit that he is cautioner in the advocacy; but we have consigned L.1400, which is more than sufficient to relieve him.

*Fullarton* for Stoddart.—This does not relieve him, as he is still a party; and it is not clear that the sum consigned will cover the whole with costs. A discharge by the

REID  
v.  
STODDART.

Clerk of the Bills, is the only way of relieving him.

*Moncreiff.*—The sum consigned is sufficient to do away the objection of interest. *Alison v. Gordon*, 17th December 1701, M. 16,705; *Sime v. Simpson*, 9th February 1793, M. 16,781; *Smyth v. Pentland*, 20th May 1809.

Mr Fullarton being doubtful of his right to reply, the Lord Chief Commissioner observed, that he was entitled to observe upon the cases cited, which he did shortly.

*Jeffrey.*—As there is no form by which a cautioner in an advocacy can be freed from his obligation, we now give in a bond by two sufficient cautioners, to relieve him, and keep him skaithless of all the consequences of his cautionary obligation; also a bond of relief from the two gentlemen, his co-cautioners in the advocacy.

LORD CHIEF COMMISSIONER.—The question originally was, whether the sum of L.1400 was sufficient to relieve him; but now there can be no doubt on the subject, from the bonds of relief produced.

A boy who was sent to Stoddart on the Sunday morning, having proved that he saw only Stoddart's father, who made



certain statements ; it was proposed, on the part of Stoddart, to call a witness to prove statements by his father, contrary to those proved by the boy ; and Mr Cockburn said—We are aware that Stoddart, senior, could not have been a witness for us ; but if they called him, we should have been entitled to cross-examine him. Now that he is dead, they, by proving what he said, have made him their witness ; and we are entitled to prove statements which he made to others, contrary to those sworn to by the shop-boy.

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*Jeffrey.*—We did not prove the statements because the father was dead, but because he acted as agent for his son. If they could prove that he made a different statement to the boy from what we have proved, that might be material.

*Cockburn.*—We deny that the father was an agent, and are therefore entitled to prove all we could have proved on cross-examination.

LORD CHIEF COMMISSIONER.—This does not require much discussion to make the ground of decision clear.

It would have been different if a witness had been called to prove the statement of the father as evidence. That was the point in the case of Thomson, Vol. I. p. 181. The point at

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present, however, is different. On the Sunday morning, the defender, Stoddart, authorises his father to tell the boy what has been proved to us : he authorises his father to disaffirm the contract made on the preceding day. There is no ground laid for calling this evidence of what a person since dead had said.

*Jeffrey* opened the case, and stated the facts, and maintained, that though the Issue was limited to the Sunday, he might prove facts as to the defender's conduct on the Monday, shewing that he had abandoned the bargain the day before. Here the defender is claiming an unbought profit; the pursuer is resisting a loss which will be ruinous to him.

*Fullarton*.—The question here is not one of profit or loss, but a simple question of fact, whether the defender abandoned the purchase he had made. Reid did not alter his books till after intimation that a demand would be made for the prize. There is only one witness. Parol evidence against the writing is incompetent; it must be dissolved by writing.

*Moncreiff*.—We are not bound to prove a solemn abandonment; and we have proved that the defender considered that he had aban-

done it. The objection to the parol evidence comes too late. The declaration of the defender proves that he made his father his agent; but it is not proof of the message he sent.

Read  
Secondant.  


**LORD CHIEF COMMISSIONER.**—This is a question of pure fact, though there has been an attempt in argument to mix it with a question of law. The Issue shews that it is pure fact, and it is peculiarly fitted for a Jury. The Issue also shews that there was a concluded bargain. It is said that the bargain was constituted by the entry in the books, and, that being constituted by writing, it could only be dissolved in the same way. But if the entry in the books was conclusive, how could it be a question in the other Court whether there was a bargain or not? If this had constituted the bargain, the case never would have been sent here to try whether it was dissolved by facts and circumstances. From the evidence of the boy taken in connection with the facts and circumstances, and the declaration by the defender, you are to say whether there was an abandonment on the Sunday. The words used by the father, as proved by the boy, are equivocal, and re-

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quire explanation ; and they must be explained by the other evidence. It is said there is only one witness ; but he is a competent witness ; and if there are facts and circumstances supporting his evidence, this is sufficient.

(His Lordship then stated the evidence.)

Something has been said of the abandonment being on Sunday. Had the contract been entered into on that day, it would have been contrary to decency ; but in the circumstances of this case, what was done was in some respects necessary. On the whole circumstances, you are to say whether you think what took place on the Sunday was a disannulling of the contract.

Verdict—" That the defender abandoned  
" his right to the lottery ticket, No. 3934, on  
" Sunday the 19th September 1813."

*Jeffrey and Moncreiff* for the Pursuer.

*Fullarton and Cockburn* for the Defender.

(Agents, *Gibson, Christie, and Wardlaw, w. s.* and *Peter Halkerston, s. s. c.*)

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PRESENT,

THREE LORDS COMMISSIONERS.

CAIRNS v. KIPPEN & BLACK.

1820.  
March 17.

**INSURANCE.**—To recover L.1800 from the owners or underwriters, as the value of a cargo of oats, shipped at Limerick, on board the Lonsdale, insured to the extent of L.1650.

**Insurance.**—Found that a vessel was seaworthy; that she struck a rock, or the ground; and was lost by the negligence of the master in sailing after she struck.

**DEFENCE.**—The pursuer cannot maintain his action, as he has not averred the cause of the loss. For the owners—The vessel was seaworthy. For the underwriters—She was not lost by peril of the sea, or other risk for which they are responsible.\*

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\* In this case, before the Issues were prepared, a motion was made for a commission, which was opposed.

**LORD CHIEF COMMISSIONER.**—We are now in the situation in which the Court of Session were before the late Act passed; and, acting upon the analogy of their proceedings, I must grant the commission, if the affidavit is sufficient.

**Claude**  
**KIPPEN, &c.**

## ISSUES.

“ 1<sup>st</sup>, Whether the brigantine Lonsdale,  
“ on board of which 1500 barrels of oats were  
“ shipped, between the 17th and 24th of  
“ January 1818, or about that time, for be-  
“ hoof of the pursuer Cairns, and insured by  
“ the defenders, Kippen and Others, at and  
“ from Limerick to Greenock, by policy of  
“ insurance dated 16th January 1818, (cargo  
“ valued at L.1650,) was sea-worthy at the  
“ time the risk insured against attached, and  
“ at the time of sailing from Limerick ?

“ 2<sup>d</sup>, Whether the said vessel was sea-  
“ worthy when she sailed from Tarbert Roads  
“ in the Shannon, on the 7th of February  
“ 1818 ?

“ 3<sup>d</sup>, Whether, when the said cargo was  
“ shipped as aforesaid, the said ship was tight,  
“ staunch, and strong, and in good and suffi-  
“ cient repair, and properly equipped and  
“ manned for the voyage insured ?

“ 4<sup>th</sup>, Whether, on some day previous to  
“ the 7th February 1818, the said ship, in  
“ sailing from Limerick to Tarbert Roads, in  
“ the river Shannon, on the voyage afore-  
“ said, struck upon a rock, at or near the  
“ Whelps in the said river ; and Whether

“ the striking of the said ship, as aforesaid,  
“ was in consequence of the negligence and  
“ misconduct of the master or pilot ?

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v.  
KIPPEN, &c.

“ 5th, Whether the master of the said ship,  
“ well knowing her state and condition, did  
“ notwithstanding sail from Tarbert Roads  
“ aforesaid, on the 7th of February 1818;  
“ and Whether the total loss of the ship, on  
“ the 8th February 1818, was owing to the  
“ negligence and misconduct of the master in  
“ sailing from Tarbert Roads as aforesaid ?” \*

In January 1818, a quantity of oats was shipped in bulk, on board the Lonsdale, and was insured by the defenders, Yuile and Others, to the extent of L.1650. The vessel sailed from Limerick on the 24th, and on the 27th or 28th struck the ground in the Shannon ; but the wind having carried her on, she proceeded to Tarbert Roads. In a few hours after sailing from the roads, in a breeze, the vessel went down.

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\* On the margin of the Issues was the following:—

“ N. B. This case is to be tried without the intervention  
“ of the pursuer, by counsel ; and the underwriters, Kippen  
“ and Others, are to act as pursuers. The owners of the ship,  
“ Black and Others, are to act as defenders at the trial of the  
“ Issues.

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v.  
KIPPEN, &c.

The log-book of a vessel, and protest taken by the master and mate, after the loss, may be produced as documents, and to prove the statements of the master and mate; but are not evidence of the facts stated in them.

In opening the case, Mr Moncreiff was about to read the protest taken by the master after the loss, and also referred to the log-book.

LORD CHIEF COMMISSIONER.—I suppose you mean to read the protest as part of your statement—not as evidence.

*Moncreiff.*—We put it in as a document.

LORD CHIEF COMMISSIONER.—If this is done by consent, the Court will not interfere; but it is desirable to have this point settled as soon as possible; especially as the practice here and at Guildhall appears to be different. If you put in the protest merely as a document, that is one thing, and not objectionable; but if you put it in as proving the facts stated in it, that is a different thing, and I think objectionable.

As to the log-book, two important questions arise; the one on the terms of the Issues, and the other on the document itself. When the Issues were preparing, I thought the term sea-worthy ought not to have been in the second, as I considered it to be a technical term not applicable to the situation of the vessel as then stated; but Mr Jeffrey mentioned, that by the decision in the case of *La Gloire*, 3. Dow, 24. the vessel must be



sea-worthy at the time she takes her second departure, though that is not to be found in the report of the case.

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KIPPEN, &c.

As to the document itself, the same question arises upon it as upon the protest. Is it to be rested on as proving the facts, or merely to prove the statement of the master and mate? This is one of the points which I am anxious to have settled, not only on the ground of the variance of the rules with regard to the protest, but also, as I think, in the case of Carleton and Strong, Vol. I. p. 32, I was led into a mistake, and admitted the log-book in too loose a way. I therefore do not wish that case to be held as a precedent.

*Jeffrey.*—It does not appear to us that there is here any question of law. It is not competent to alter the Issues, and we are entitled to have a foundation laid for the question, which was *argued* in the case of *La Gloire*, though it does not appear in the report. We mean to rest on this chiefly as shewing the conduct of the master, but also as a statement or admission by the defenders. It would have been received in the Court of Session.

LORD CHIEF COMMISSIONER.—If you merely mean to use the protest as the admission of the authorised agent of the party, I

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may be bound to admit it. But in this case there is a confusion from the situation of the parties, the question being between the insurers and the owners of the vessel. If the decision is, that the vessel was not sea-worthy, the case is at an end ; but if it is that she was sea-worthy, there may still be a question behind. The Issue being solemnly approved of, we undoubtedly cannot now alter it ; but in the course of the trial, facts may be proved that may be of importance to this other question.

The master of a vessel is agent for the owners ; and statements made by him may be given in evidence by the underwriters.

A witness was called to prove what the master had said of the state of the vessel at the time of sailing.

*Cockburn.*—This is incompetent, as the master is not one of us.

*Jeffrey.*—The master is a party, and the competency of the proof cannot be doubted.

LORD CHIEF COMMISSIONER.—If this were a question betwixt the insurer and insured only, there is scarcely any part of the evidence which has been given which I should have thought proper ; but this is a question also between the owners and insurers ; and there is no point in law clearer, than that the master is agent for the owners. It is on this principle I admit the evidence, without en-

tering into the question, whether the master is a defender or not.

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v.  
KIPPEN, &c.

A witness was called, and asked, when a ship strikes in going out of a harbour, or soon after, what is the duty of the master?

The facts of the case under trial ought to be stated to a witness called to give his opinion as a person of skill.

LORD CHIEF COMMISSIONER.—If you had given evidence of the nature of the stroke, or if you describe it, you may ask the opinion of the witness on these facts; but you cannot put the general question in the manner you propose.

His Lordship then read his notes of the evidence of a preceding witness, when Mr Jeffrey submitted to the Court, that he was entitled to put the general question, or at least to read the log-book to the witness.

LORD CHIEF COMMISSIONER.—You are entitled to lay before the witness, all the evidence that has been given, and to ask his opinion on it as a person of skill.

*Moncreiff*, for the pursuers, opened the case, and stated the facts, and maintained that the defenders must shew that the loss was by peril of the sea. To do this, they must first shew that the vessel was sea-worthy, as they, and not the pursuers, ought

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to know this fact; if she is not sea-worthy, there is no contract, as the insurer has no chance of gain. The action is against both the owners and underwriters; but the question here is between the owners and underwriters; and in a question with the owners, every thing must "be in that state and condition in which it ought to be." Park, 332 and 345; Christie v. Suretan, 8. T. R. 192; Douglas v. Scougall, 1816. 4. Dow, 269. The insurance is *at* and *from*; and there might be a question whether the vessel was sea-worthy at Belfast; but at all events she must be sea-worthy at the time of sailing. Park, 344 (a).

A vessel is presumed sea-worthy; but if, in a short time after sailing, she becomes unmanageable, the opposite presumption holds. Park, 333 (a); Parker v. Potts, 3. Dow, 24.; Watson v. Clark, 1. Dow, 336; and the defenders do not state any sufficient cause for the loss. We shall prove the 1st, 2d, 3d, and 5th Issues; the proof of the 4th lies on them.

*Gordon*, for the defenders.—In this case, though there are several Issues, the real question is, whether this vessel was sea-worthy at a particular time. As the oats were insured and never arrived, it is admitted that

either the owners or insurers are liable; we also admit, that we were bound to furnish a sea-worthy vessel, and aver that we did so. If a vessel founders apparently without any sufficient cause, the presumption is, that she was not sea-worthy; but here the accident she met with, combined with the foul weather, make these presumptions fly off, and the other party must prove that she was not sea-worthy at the time of sailing. They seem to hint that she must be sea-worthy at the time of sailing from Tarbert Roads; but I can find no authority or dictum in support of such an opinion. The master is in a difficult situation, and must do the best he can for all concerned.

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The account in the log-book, as well as the protest, is made up by the master, and is therefore not evidence. Park never even mentions the log-book, and Marshall mentions it only as throwing light on the question of neutrality, and that the protest is not evidence so long as the master is alive. The objection was taken in the case of Carleton and Strong, Vol. I. p. 32.

*Jeffrey.*—The present proceeding is merely to ascertain two points upon which the Court of Session may found its decision.

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KIPPER, &c.  
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The points are, Whether this vessel was sea-worthy, and whether she was lost by the improper conduct of the master in sailing from Tarbert Roads.

It is admitted, that the weather alone was not sufficient to account for the loss; and therefore the presumption that the vessel was not sea-worthy would hold. But it is said she struck in coming down the river. Even if she did touch, it must have been so slight as not to injure a sea-worthy vessel.

On the second point, there is still less doubt. It is said witnesses who saw the vessel are to be preferred to those who merely give their opinion; but in this case the evidence must be that of opinion; and the witnesses swear that it was the master's duty to have returned, and to have had the vessel examined.

**LORD CHIEF COMMISSIONER.**—After so long and painful an attention to the evidence, I regret that it will be necessary for me to go into some detail; for though there are properly only two questions, there is some intricacy in the case, from the situation in which the parties stand to each other.

If the case had taken the usual course, this

would have been a claim by the assured against the underwriters, and the conduct of the master would have been a separate ground of inquiry ; but here we have both questions, as this is a question between the owners and the underwriters.

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v.  
KIPPEN, &c.  


The first subject of inquiry is, whether the vessel was sea-worthy ; the second, the conduct of the master in sailing from Tarbert Roads.

The answer to the first Issue must be in reference to the law on the subject, and some explanation is necessary.

The term sea-worthy has long been understood as a technical term relative to the contract of insurance, which is a contract of indemnity, and has certain implied conditions. One of these is, that the vessel must be sea-worthy, and capable of performing the voyage ; and the liability of the party does not depend on his knowledge that she was not sea-worthy.

When a party comes into Court claiming for a loss, the answer is, the vessel was not sea-worthy. This may be proved either by positive evidence, or by presumption ; but if it is proved, there is an end to the right to recover.

In the first Issue the question is put, whe

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ther she was sea-worthy at the time the risk attached, and at the time of sailing? You may free your minds from the consideration of the first of these points, though you may, if you choose, answer both.

On the question stated from the Bar as to presumed unsea-worthiness, the law on the subject is laid down in *Parker v. Potts*, 3. Dow, 23. The words are, If without adequate cause, &c. (reads). The case referred to in the report was also from this country; *Watson v. Clark*, 1. Dow, 336. The principle is, that when inability to perform a voyage occurs soon after sailing, the presumption is, that the cause of this inability existed before the vessel sailed; but does this apply to the present case? If the loss happened without any supervening accident, you cannot find that she was sea-worthy at the time of sailing. But is this consistent with the facts proved by the same pursuer, in support of the 5th Issue? In that part of the case, evidence has been given, in order to shew the improper conduct of the master; and if you are satisfied on this branch, that the vessel was lost in consequence of the accident, then the presumption holds that she was sea-worthy be-




fore sailing. The question is, whether she had a latent defect, or was lost by a supervening accident. If you think she was lost without any accident, you will find her not sea-worthy; but if you think the accident sufficient to cause the loss, your verdict will be the other way.

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*2d Issue.*—On this I early stated my opinion, and I am still satisfied that we cannot alter the terms of this Issue; but if you return an answer to it without explanation, it would, in my view of the law, leave a fact uncertain for the other Court. I hope the time will come, when the whole question will be tried in this Court upon the general issue; and in this way the evil arising from the omission of a particular fact will be avoided. It appears to me inconsistent to make the seaworthiness attach at any time, except at the time of sailing; because, if the loss is held to be occasioned by a latent defect, the presumption that the vessel was not sea-worthy, draws back to the date of the policy, which, therefore, never was binding, and the risk never attached.

In framing this Issue, we have been guilty of a misuse of the term sea-worthy. Here it can only be dealt with in its popular, not its

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legal sense. If it is meant, whether the vessel was capable of performing her voyage, the question is included in the last Issue. If it is meant to apply to latent defect, it is included in the first.

*3d Issue.*—On this, I merely refer you to the evidence you have heard.


*4th Issue.*—As to the first question here, one or two witnesses spoke of a rock; most of them mentioned the ground. The precise point where she struck not being fixed, you may say she struck on her passage from Lime-rick to Tarbert Roads. You have no evidence of the negligence or improper conduct of the master or pilot; and you have evidence of the great rise and fall of the tides.

*5th Issue.*—It is understood that the verdict upon this will settle the rights of the parties. The first part is pure fact, the last is partly law.

There is a curious anomaly in the law of insurance, that the insurer is liable for the barratry of the master; but though this is the law, it is well understood that the owners, not the insurers, are responsible for the conduct of the master, if it is short of barratry. This is laid down by Mr Justice Lawrence, and has since been confirmed by Mr

Justice Chambre, though I have not been able to lay my hand on the cases.

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The master being appointed by the owners, they must know his character, and how far he is to be trusted with property; at the same time the conduct of the master on this occasion was out of sight of the owners; and you must consider well how far his conduct was such as to bind the owners; at least, it is with this feeling that you ought to consider this part of the case.

It is a singular fact, that the accident is not mentioned in the log-book; and from this Mr Jeffrey wishes to infer that it did not occur: but all the witnesses who were on board, and one who was not on board, swear to it. Up to the time of the accident, no grain appeared in the pumps; but even if there had been a little, that is what occurs in the best vessels. After the accident there was a "deal" of grain; and you are to judge whether this was known to the master, and whether it was misconduct in him to sail with her in this state.

The two parts of this case bear on each other, and so singularly, that if we hold that she was not sea-worthy at the time of sailing, then the loss does not fall under this Issue;

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but if we hold that the coming up of the grain was occasioned by the accident, and that it was blameable in the master to sail, we must, on the other hand, hold that she was seaworthy at the time of sailing from Limerick.

You have had much evidence as to the state of the vessel, and you have had the evidence of very competent witnesses on board, that it was not improper to sail. On the other hand, you have the evidence of opinion; and, with one exception, all these witnesses agree that it was a case for inspection. You have evidence of more frequent pumping after than before the accident, and also of an attempt at concealment and misrepresentation, which is always to be taken into view. The question is, whether the master judged wrong, and so wrong as to render the owners liable.

**Verdict.**—The Jury found that the vessel was seaworthy at the time the grain was shipped, and at the time of sailing from Limerick—that she was not seaworthy at the time of sailing from Tarbert Roads, in consequence of striking the ground on her way from Limerick to Tarbert Roads—that she was tight, staunch, and strong, &c.—

that she struck a rock or the ground on her passage, but that it did not appear to be by the negligence of the master or pilot—that, notwithstanding the striking, she sailed—and that the total loss was owing to the negligence of the master.

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*Clerk, Jeffrey, and Moncreiff, for the Pursuer.*

*Jo. Gordon and Cockburn for the Defenders.*

(Agents, *Gibson, Christie, and Wardlaw, w. s.* and *Alexander Youngson, w. s.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

### ANDERSON v. PYPER & Co. &c.


1820.  
March 18.

AN action of damages against the proprietors, guard, and driver of a stage-coach, at the instance of a passenger hurt by an overturn.

Damages claimed against the proprietors, guard, and driver of a stage-coach, for injury done by an overturn of the coach.

DEFENCE.—The overturn was occasioned by a defective axle, for which the defenders are not liable.

ANDERSON  
v.  
PYPER & Co.  
&c.



## ISSUES,


“ Whether, on or about the 18th day of  
“ July 1818, the Waterloo Coach, run by  
“ John Pyper and Company, and others, de-  
“ fenders, and of which the defender John  
“ Watson was guard, and William Walker  
“ and John Forrest were drivers, was over-  
“ turned on the road from Kinross to Perth,  
“ at or near Milnathort, in the county of  
“ Kinross, in consequence of the negligence  
“ or improper conduct of the said coachmen  
“ or guard in driving the said coach, whereby  
“ the pursuer, then passenger in said coach,  
“ suffered bodily harm, to the damage and  
“ injury of the said pursuer ?

“ Whether the said coach was overturned,  
“ time and place aforesaid, in consequence of  
“ one of the axle-trees being badly construct-  
“ ed, faulty, and defective, or composed of in-  
“ sufficient materials, whereby the pursuer,  
“ then a passenger in said coach, suffered  
“ bodily harm, to the damage and injury of  
“ the said pursuer ?

“ Whether the alleged faulty and defective  
“ construction of the said axle-tree, and the  
“ insufficiency of the materials by which the

“ accident is alleged to have happened, arose  
“ from the inattention, negligence, or mis-  
“ conduct of the said defenders, or persons  
“ acting for them therein ?

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PYPER & Co.  
&c.



“ Damages laid at—for medical expences  
“ L.200, solatium L.2000.”

It having been stated that the defenders refused to produce the way-bill, Mr Moncreiff, at the conclusion of the pursuer's evidence, offered to produce it; but Mr Jeffrey said that the production was of no use, as they could not then search for witnesses.

LORD CHIEF COMMISSIONER.—This summons is dated in 1819, and you state that ten days ago you called for the way-bill, to enable you to find out witnesses. We do hope that the time will come, when parties will inquire after their witnesses before they bring their action, and not after the Issues are settled.

*Alison* opened the case for the pursuer, and contended, that at common law the proprietors of the coach are liable for the damage done by any defect in it, whether visible or not, as well as for negligence or improper conduct of their servants. That, *in addition* to the common law, there was a statute (50. Geo.

ANDERSON  
v.  
PYPER & Co.  
&c.

III. c. 48.) regulating the number of passengers, &c. and to prevent them sitting on the luggage.

*Moncreiff*, for the defenders, maintained that the defenders were not liable for a latent defect;—that the furious driving and overloading was disproved by the pursuer's witness;—that if a passenger sat on the luggage, there was no necessity for his doing so; and that the plea founded on the statute, was a new one, brought out now for the first time. If the coach had been top-heavy, the statute might have applied.

LORD CHIEF COMMISSIONER.—The act gives its own remedy, by imposing a penalty, but does not apply to this case.

*Moncreiff*.—The second Issue is more important than the first; but even if you find upon it for the pursuer, you cannot find damages against us, the proprietors.

The question here is, the state of the coach before the accident, and all the evidence applies to the appearance of the iron after the accident. In England, Sir J. Mansfield held, that the injury being proved, the presumption was against the proprietors.—*Christie v. Greggs*, 2 Camp. 79. But in this country, it is necessary to prove some negligence on the



part of our neighbours, to entitle us to claim reparation. It was a *damnum fatale*, or *absque injuria*. There is no evidence that the flaw existed before the coach left Queen's Ferry.

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&c.

*8d Issue.*—To entitle the pursuer to damages, he must prove both the *2d* and *3d* Issues. We shall prove that we furnished a sufficient coach, and were attentive in inspecting it; and there is no warranty of the safe conveyance of passengers, as there is of goods.

*Jeffrey*, for the pursuer, maintained—The pursuer paid for conveyance in a sound coach, and had been put into an unsound one; and, as a lawyer, he was not aware of the distinction between conveyance of passengers and luggage. Though he did not maintain the liability of the proprietors for a pure accident arising from some external cause; yet he held them liable, if they furnished insufficient horses, carriages, &c. whether they knew it or not, in the same manner as the owners are liable if a vessel is not sea-worthy.

The *1st* and *2d* Issues must be taken together; and they amount to this, that the

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&c.

coach was weak, and that, from overloading and overdriving, the axle broke. The presumption, according to the case quoted, is, that the overturn arose from negligence; and there is no law to shew, that general evidence is sufficient to get over this presumption. I must protest against what is said as to the inspection being sufficient in the case referred to; but even if it were the rule, there is no proof of such inspection in this case.

LORD CHIEF COMMISSIONER.—The two questions here are, *1st*, Whether the pursuer is entitled to a verdict? and *2d*, If he is so, what is the amount of the damages?

*1st Issue*.—The overturn, and the damage or injury suffered, have been distinctly proved; but the real question here is, whether this overturn and injury were occasioned by the negligence of the defenders; and it has been correctly stated to you, that the proprietors are liable for the negligence of their servants.

It will not be necessary to go through the evidence in detail, as it must be sufficiently in your recollection. There is contrariety of evidence as to overdriving; but in my view,

the evidence against the coach being overdriven, greatly preponderates. However, this is a matter entirely for your consideration.

In my opinion, you are not, in this case, to take the act of Parliament referred to as law, but as evidence. It is not to be held as fixing the number of passengers, so that the proprietors are liable in damages if they exceed this number; but it is to be taken as evidence of what the Legislature thought was the proper number of passengers, and as a criterion to assist you in forming an opinion on the question of overloading. There is nothing in the terms of the Issues which would entitle you to consider it in any other view.


So far as I know, this is the first case of the sort which has been decided in this country; and even in England there have been very few such cases. If I considered the carriage of persons to fall under the same rule as the carriage of goods, I must then state to you the law of common carrier, as regulated by the law of Scotland.

But I consider the case of passengers different; and as no case has been mentioned similar to the present, I must draw what light I can from the analogy of the law in the

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&c.

Proprietors of  
a stage-coach  
not liable in  
damages to an  
individual, un-  
der 50, Geo.  
III. c. 48. See  
p. 264.

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&c.




other end of the island. My brother thinks it conformable to the law of Scotland, to hold the principle stated from the Bar, and drawn from that country, as the principle that should regulate the present case; and this I state to you, not as the law of England, but as a general principle to regulate a case not yet decided in this country. The rule then is, that if the carriage is sound as far as the human eye can discover, the proprietors are not liable; and this I state to you as the subject of inquiry in the present case.

You must discard from your minds the analogy stated as to the carriage of passengers and goods. The fear of the tricks of common carriers has led to a rule, making their case an exception from the general principle, and holding them absolutely responsible for the damage done to goods committed to their charge, unless it arises from the act of God or the King's enemies; but the same reason does not hold as to passengers. In England, the principle at first was thought to be the same, but on farther inquiry it was found to be different; and in this first case in this country, the Court mean to lay it down to you distinctly, that the law is not the same as to passengers and goods.


**2d Issue.**—This is a mere question of fact; and if you are of opinion that the axle was not faulty, you will find for the defender; but if it was faulty, then comes the third, which is the important Issue.

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&c.



**3d Issue.**—In this we must attend to the meaning of negligence, inattention, &c.; and these are best understood by considering the converse of them, diligence, attention, &c. In this, as in every thing else, the words must be taken in reference to the matter under discussion. The question then is, whether that care, diligence, and attention, which is applicable to the subject, has been used; whether the defenders have used the utmost care to which human foresight could reach. You are to consider the state of the coach, and form your opinion whether the human eye could have discovered the defect. It requires a clear case to be made out; and has the pursuer made out such a case? Has he proved insufficiency; and have the defenders proved that it could not have been discovered? These I lay down to you as the principles on which you are to judge of this case; not because they are the law of England, but because they are the dictates of common sense.

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&c.



(After reading part of the evidence, his Lordship proceeded)—

You are to say whether there was such appearance of defect as the eye of an artificer, applied with reasonable attention, could discover; and will take into consideration, that the eye of an experienced person might discover defects imperceptible to others. After contrasting the evidence of the different witnesses, you will find for the pursuer or defenders, according to your opinion on this point.

(After commenting on the evidence for the defenders, his Lordship said)—

I think you had better find generally for the pursuer or defenders, than adopt the suggestion from the Bar, of finding a special verdict. By a general verdict, I think justice will be done in the case; and if there are any objections to the direction in point of law, they will be better and more neatly brought into discussion on a motion for a new trial, and a Bill of Exceptions taken to the decision then given.

Damages ought never to be given as a punishment, but as a reparation; and in the present case, we have nothing to do with the

police of the country, or correction of the defenders.

I feel very anxious as to the result of this case, being the first on the subject; but though it is very desirable to have the law settled, that cannot be done by running wild on the subject.

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**Verdict—" For the defenders."**

*Jeffrey and Alison* for the Pursuer.

*Moncreiff and Cockburn* for the Defenders.

(Agents, *Tennent and Lyon*, w. s. and *James Greig*, w. s.)

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PRESENT,


LORDS CHIEF COMMISSIONER AND GILLIES.

A rule was obtained upon the defenders, to shew cause why a new trial should not be granted.

1820.  
May 23.  
New trial re-  
fused.

*Moncreiff*.—This application was made on three grounds. 1st, That the distinction drawn between the principle applicable to passengers and goods, is not founded in law. 2d, That the question of whether the coach was overloaded, under 50th Geo. III. was with-

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<sup>v.</sup>  
PYPER & Co.  
&c.



drawn from the Jury. *3d*, That the verdict is contrary to evidence.

It is said we are liable for the insufficiency of the coach, even if there was no negligence. It is on the doctrine of reparation alone that the coach proprietors are liable. The presumption of fraud is the foundation of the liability of a carrier; but was this ever applied to injury to a person? Even in the case of a ship which is relied on, proof that she was minutely inspected before sailing, throws the burden of proof on the other side; but the warranty of a vessel only applies to goods. The argument on the other side goes to this, that we must furnish a perfect machine. In 2. Campbell, 79. this very case is decided.


It is said there was misdirection as to the overloading.

LORD CHIEF COMMISSIONER.—As I understood Mr Jeffrey at the trial, he stated, not only that the overloading caused the accident; but also that he was entitled to damages on account of the loading being contrary to the Act of Parliament.

*Moncreiff*.—We hold this to have been a fair Jury question as to negligence, which was fairly submitted to the Jury.




*Jeffrey*, in applying for the rule, and now in reply, stated—We apply for a new trial on the ground of misdirection; the Jury having been directed that the proprietors were not liable, if they had used all diligence to discover the flaw in the axle.

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v.  
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&c.  


We maintain, that the law of Scotland does not recognise the distinction laid down at the trial; and that though the carriage of passengers does not fall under the presumption of fraud, as in the case of goods, that still the proprietors are liable for an injury done to either. The case is similar to that of a vessel, which must be sufficient. *Abbot*, 229.; 5. *East*, 428, *Lyon v. Mills*.

In the contracts of sale, location, &c. the party gives an absolute warranty; and it is expedient the same should apply here. This is the doctrine of the Roman law, and *Pothier* holds the same.

There is some puzzle in the law of common carriers, by holding fraud as the foundation of the claim. It might be introduced on that ground, but is now supported on general policy, as an injury to goods cannot be said to be fraudulent. *Mr Campbell* says, this question has not been solemnly tried in England, and his opinion is in our favour.

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v.  
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&c.  


We do not found much on the overloading, but were entitled to a verdict on the second Issue; and in that respect the verdict is contrary to evidence.


**LORD CHIEF COMMISSIONER.**—The Court was very desirous to hear parties fully. The object of the motion is, that we should enable parties to have recourse to another trial; and the application is grounded in part on a question of law.

The questions here were, how far the insufficiency of the carriage was the cause of the injury; whether the proprietors are liable to repair the injury; whether a human being injured by the accident, is entitled to recover damages for the suffering occasioned by this overturn?

It is said that the right to recover damages in this case rests on the law of common carrier; but this is not correct. A carrier is bound absolutely to convey the goods to the place of destination; but in this sort of undertaking the proprietors are only bound to furnish a carriage sufficient for the purpose, and to give all possible diligence to that end.

The law of common carrier, it was said, is not now founded on a security against

fraud; but in all the books and authorities, that is made the ground of the liability.

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v.  
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&c.  


The principle of fraud cannot apply to human beings: they cannot be made away with like goods.

*M'Causland v. Dick*, M. M. 9246.; *Ersk.* III, 1, 28, 29.

Neither does the principle of sea-worthiness apply. The peculiar contract of insurance on ships makes seaworthiness necessary as applicable to that contract, but not to other contracts.

The principle which governs the furnishing carriages for conveying persons is this: The carriage must be sufficient, as far as human care and inspection can secure sufficiency. The liability for injury to a person rests on the negligence of the owners, and not on the securing against a fraud.

Although there have not been so many cases here as in England, I am of opinion, that what I stated is the law of Scotland, as well as of England. When I refer to the law of England, it is not as deciding the question, but to see whether there is a principle which, by analogy, would apply here. It is said the English cases are not solemn decisions; and reference is made to the opinion of the reporter. I shall not say whe-

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<sup>v.</sup>  
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&c.

ther we ought to refer to the opinion of a private lawyer as authority; but I must say, that the case of *Aston v. Heaven et Alt*, 2. Esp. 531, is not a mere *nisi prius* case, but is reported, and has been subjected to the criticism of the Bar, without being questioned.

I am of opinion that the liability rests on negligence, and have stated the grounds of my opinion.

As to the coach being overloaded, if there was any error, it was in admitting evidence on the subject. It is not stated in any of the papers as the ground for subjecting the proprietors.

As to the verdict being contrary to evidence, if I am right in the law, then the question of negligence must always be for the Jury,—we cannot fix how many inspections are necessary, and with what velocity the coach may move. Had a case of gross negligence been made out, the Court might have set aside the verdict; but as the flaw had only the appearance of a hair, which, on the evidence, the Jury thought human skill could not discover antecedently to the cause of the injury; and as evidence of attention on the part of the proprietors was laid before the Jury, with which they were satisfied, we think we ought not to grant a new trial.

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PRESENT,  
LORDS CHIEF COMMISSIONER AND GILLIES.

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v.  
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MELVILLE v. CRICHTON.

**DAMAGES** for defamation in an anonymous letter.

1820.  
March 21.

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Damages for  
defamation in  
an anonymous  
letter.

**DEFENCE.**—A denial of having written or sent the letter.

**ISSUE.**

“ Whether, on or about the 14th January  
“ 1819, the defender did write, or cause to  
“ be written, and did send, or cause to be  
“ sent, an anonymous letter, addressed to  
“ Lady Mary Lindsay Craufurd, Craufurd  
“ Priory? or, being in the knowledge of the  
“ contents thereof, did send, or cause to be  
“ sent, the said letter to the said Lady Mary  
“ Lindsay Craufurd?” (The Issue then quoted the letter.)

“ Whether the expressions in the said  
“ letter were of and concerning the pursuer,

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“ and were of and concerning his manage-  
 “ ment of the coal-works of Teasses, the pro-  
 “ perty of Lady Mary Lindsay Craufurd,  
 “ and of his conduct at a roup of the grain,  
 “ corns, or growing corns at Skelpie, a farm  
 “ belonging to the said Lady Mary Lindsay  
 “ Craufurd, falsely, injuriously, and mali-  
 “ ciously defaming the pursuer in his good  
 “ name, and calculated to cause the ruin of  
 “ his character in the good opinion of his  
 “ employers ?

“ Damages laid at L.2000.”

In opening the case, Mr Alison mention-  
 ed, that though the letter was written in a  
 feigned hand, there were several of the cha-  
 racters which were written in the same man-  
 ner as they were written by the defender.

LORD GILLIES.—This is a mere asser-  
 tion, and you had much better wait till the  
 documents are proved, and then state the par-  
 ticulars in which they resemble.

In an action  
 for defamation  
 in an anony-  
 mous letter,  
 the writing  
 and publica-  
 tion ought to  
 be proved, be-  
 fore proving  
 malice in the  
 alleged writer.

The second witness was asked as to ex-  
 pressions used in conversation by the defender  
 in regard to the pursuer.

LORD CHIEF COMMISSIONER.—The only  
 difficulty in receiving this evidence at pre-

sent, is, that the pursuer may fail in proving the other branch of his case, which lays the foundation for this. But I suppose the defender does not object.

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**LORD GILLIES.**—What is the object of this proof?

*Jeffrey*, for the pursuer.—We wish to prove malice, and are entitled to do so at present.

**LORD CHIEF COMMISSIONER.**—What is the use of this proof, if you fail in proving the letter.

*Cockburn.*—It is our interest to allow this attempt, as we know they must fail.

*Jeffrey.*—We are entitled to lay a foundation, to shew the probability that the defender wrote the letter, and to meet any proof they may bring that the parties lived on good terms. There cannot be a doubt that proof of malice is competent; and it is allowed every day in the Court of Justiciary. We may have begun at the wrong end, but are ready to change.

On a question from the Lord Chief Commissioner, **LORD GILLIES** said—They prove malice at any time in the Court of Justiciary. If proof of the defamatory nature of the letter

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was necessary, I could understand the necessity of proving malice ; but if this letter is clearly defamatory, can there be any necessity for proving ill will in the mind of the author ?

LORD CHIEF COMMISSIONER.—This is an important question, though I agree that it relates more to the order, than the admissibility of the evidence ; but evidence which is admissible at one stage of a cause, may be inadmissible at another. What I should consider the proper method of proving this case would be—first, to prove the hand-writing, then the publication, and afterwards the conversation.

The evidence now offered may be admissible in support of the other proof, but it is only evidence in aid ; it is not originally good.

Mr Lizars, an engraver, was called ; and having stated that he was accustomed to examine hand-writing, was asked whether certain letters admitted to have been written by the defender were genuine ?

*Fullarton*, for the defender, objected.—This gentleman does not know the defender's hand-writing.

LORD CHIEF COMMISSIONER.—Would it not be material that we knew the question to



which the objection is taken? It has been admitted, and therefore we must hold, that the letters in process are the genuine hand-writing of the defender, which saves the trouble of proving them genuine. Mr Lizars, a man of skill, is desired to look at these; and Mr Fullarton objects to his being asked whether, from his general knowledge of hand-writing, he thinks them genuine. The question involved in this is one of the most momentous that can occur in a Court.

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It was then suggested that the counsel should first put the questions, to which there was no objection.

Mr Lizars having sworn that the genuine letters appeared to him to be so, and that the anonymous one appeared to be written in a constrained hand, was then desired to say whether there were characters written in a peculiar manner in the genuine letters, and whether they were written in the same manner in the anonymous one.

*Comparatio litterarum* by engravers competent evidence.

*Fullarton* objects.—This person never saw the defender write; and this is offered as the sole evidence that the letter was written by him. This is an attempt to cut the Jury out of their right to compare the letters. *Com-*

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*paratio literarum*, by the law of Scotland, is not competent as a substantive article of proof, but only as an auxiliary.—Hume, Vol. II. p. 209. In England, the only competent proof is, that a writing is in a constrained hand.—Peake, 114.

*Jeffrey*.—There is here a singular confounding of objections. The authorities only prove that this evidence is not *per se* sufficient. The objection to it in England rests entirely on a subtlety as to seeing a person write. In the case of Snodgrass Buchanan, the Court allowed particular letters to be suggested to the engravers for particular inspection. The same was allowed in this Court, *Hepburn v. Cowan*, Vol. I. p. 264; and in a case tried at Aberdeen. Comparison of the writings by a person of skill is much better than the evidence of a witness who speaks from general recollection of the hand-writing.—*Ersk.* 4. 4. 71. p. 843. It is said we have not proved any thing. We proved this letter to have been in the custody of the defender.

LORD GILLIES.—The case at Aberdeen was tried before me; but the proof in that case was very different from the present. There, the proof was by witnesses swear-

ing to their belief that it was written by a person with whose hand-writing they were acquainted, which is a much higher species of proof than *comparatio literarum*.

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*Fullarton*.—We do not object to the papers going to the Jury, or to the defender calling persons who are acquainted with the hand-writing.

LORD CHIEF COMMISSIONER.—It is of infinite consequence that this point should be properly settled; and in this case it is a matter of considerable difficulty. I hope a case may soon occur, where, without inconvenience to the parties, a decision in the last resort may be obtained. In this country the question occurs much oftener than in England; and I wish we had a fixed rule, from which we could not deviate.

In England, the plaintiff must give *prima facie* evidence, to entitle him to proceed with his case; but here so many things are taken as judgments, and held correct till the contrary is proved, that it is difficult to apply the principles adopted in the one country, to cases occurring in the other.

To me, however, it appears a rule of right reason, that the best evidence should be pro-

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duced. What then is the best evidence in the matter of hand-writing?

In the law of Scotland there is a clear distinction between proof of hand-writing *comparatione literarum*, and proof by a person who has seen the party write, or who, for a period of time, has corresponded with him. The person in the last mentioned way has his mind framed to know the general appearance of the writing; and when called as a witness, he is not to speak as a person comparing two sheets of paper, but to say, from his general knowledge of the hand-writing, whether the paper shewn to him is written by that person. It is not necessary to read a word of the paper: the general appearance is recognised, just as a person recognises an acquaintance, without looking at any particular feature of his face. There is a general impression made on the human mind, corresponding to the similar traces made on the paper by a pen in the hand of the same individual. The witness does not speak from a comparison made at the time, as by laying two sheets of paper together, and saying whether the words, letters, &c. resemble; but he speaks from the impression made on his mind by the appearance of the writing shewn to him, compared with what

he previously knew, and retains in his mind. This is the highest species of evidence of hand-writing; and, when the party is well acquainted with the hand-writing, never errs.

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There is no objection to a proof by persons of skill, that a writing is in a feigned hand; but if the person is not acquainted with the hand-writing of the party, the question arises whether he may go a step farther, and, merely by comparing it with another writing, prove them to have been written by the same individual. In England this would not be competent; but I do not say the same rule holds here, or that it would not be competent at some stages. I mention the law of England, not as wishing to establish it here, but as illustrating what I think should be done in this case.

Sidney's case was reversed on the ground that the conviction had proceeded on comparison. The case of the Seven Bishops; Taylor's case; Cator's case, at the Kent Assizes; the case of Judge Johnstone, and many others, illustrate this subject.

In the Ecclesiastical Courts in England, proof by comparison would be competent, but not where a Jury is to judge; and Lord El-

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don, in one instance, puts the case of a Jury who cannot read.

This illustrates what I think ought to be done here. The pursuer ought to bring the best evidence—that of persons who know the defender's hand-writing.

I state this, not because it is the law of England, but as illustrating the principle; and after the best evidence is given, the question would arise, Whether we ought to receive the evidence now offered? If they proved that the best evidence could not be got (as was done in the case Hepburn and Cowan, Vol. I. p. 264), then what is now offered, being evidence by the law of Scotland, might be called.

I wish to put this question in shape for a Bill of Exceptions, on a motion for a new trial. If the rule of the law of Scotland is imperative, we must admit the evidence; and perhaps it may be fairer to put the defender in the situation of objector, as the pursuer may have been thrown off his guard, by the admission of the genuine letters, and may not have witnesses here acquainted with the hand-writing.

LORD GILLIES.—I perfectly concur in

every one of the observations made. There is the same rule with us as in England, that the best evidence must be brought; and though we may have known it violated, still, as to the rule, there is no doubt. The rule is, that the best possible evidence must be brought, and that secondary evidence is not receivable, when the best is to be had. I trust the reverse of this is not the rule of any law, and especially of the law of Scotland.

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The best possible evidence of hand-writing is calling a person who saw the document written, but this seldom can be had; and as to this, the rule is dispensed with, as it is known it cannot be given. The next best evidence is that of persons who know the hand-writing, either by having seen him write, or having corresponded with him.

The nature of the inquiry is very well illustrated by examination of the human countenance. Mr Lizars may be better able to detect minute similarities or dissimilarities in the writings, but the writing is not an acquaintance. The evidence of those who know the hand-writing, though it ultimately resolves into a comparison, is something quite different from comparing two sheets of writ-

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ing : it is not a comparison at the particular time, but a comparison of the writing with the general knowledge possessed of the hand-writing. If a person has 1000 pages of writing, and is called on to speak from a comparison with these, the case might be different ; but here there is no such case. The defender is a gentleman who must have written a great deal ; and a few letters only are produced. Witnesses may yet be brought who are acquainted with his hand-writing ; and I should conceive, that though at present it may be necessary to admit this evidence as competent by the law of Scotland, yet, that unless the pursuer brings other evidence, it will not be sufficient. There may, however, be other facts proved, which must go to the Jury ; such as, proof to shew that the letter came from him.

*Cockburn.*—We understand that they are allowed to go into this investigation now, on the supposition that better evidence will be brought ; but if they do not intend to bring this, it is admitting inferior evidence to go to the Jury.

LORD CHIEF COMMISSIONER.—It by no means follows, that even if the Court had rejected this, there is no case to go to the



Jury. I understand it to be Lord Gillies's opinion, that this evidence is admissible by the law of Scotland, and that it is so now.


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LORD GILLIES.—My opinion is, that it is admissible by the law of Scotland; but that it is not alone sufficient, though it may be fortified by superior evidence. If the party does not bring better evidence, that will be matter for Mr Cockburn and your Lordship to observe upon.

*Alison* opened the case, and stated—The letter must have been written by a person superior to a servant. It is written in a feigned hand. The defender delivered it to the Ceres post, and gave different accounts of how he got it. We shall shew malice on the part of the defender, and shall prove, by writing-masters and engravers, that the letter was written by him.

*Fullarton*, for the defender, stated—A short detail of the case is the best answer to the long evidence adduced by the pursuer. The defender being connected with the family, was frequently consulted by Lady Mary Lindsey Craufurd, and letters for her frequently came to his care. He does not deny that he may, in this manner, have sent the

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v.  
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letter in question ; but he denies having sent an anonymous defamatory letter ; and the real and only question here is, whether he wrote it.

There has not been a single question asked at any witness who knew the hand-writing, though no doubt many of the witnesses knew it ; and the pursuer has not even brought an inspector of franks, or bankers' clerk, who are accustomed to detect forgeries, and to act on the opinions they form. The persons they have called are not accustomed to act on the opinion they form, and the evidence is of an inferior kind. Ersk. IV. 4. 71. p. (843.) ; Burnett, c. 18. p. 501 and 502. It is not competent to send it to you ; but even if it were, the pursuer has not made out his case. It is said an anonymous letter is as bad as any other ; and it is so, if it produces any effect ; but here it had no effect ; and if any damages could be given, they must be the smallest possible. If by possibility you are not quite clear upon the case, the smallness of the damage is a ground for turning the scale ; and you will consider the heavy punishment which a verdict against the defender will inflict upon him, not only by the amount of the expences, but, what is far more serious, by the manner in which it must affect his character.

**LORD CHIEF COMMISSIONER.**—You are to consider the question in the Issue; and there is nothing so clear as this, that unless you are satisfied that the defender is the writer of this letter, you cannot find him liable in damages. To make out that he is the writer, there has been laid before you evidence, that he gave the letter to the wife of the runner from Ceres. You have then the evidence of the husband, which is material to complete the chain. The letter is objected to at Cupar by Lady Mary's servant, and a double post mark is put upon it, that it may be known; and in this way the letter is identified; and the question is, whether the defender is the author of the letter.

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CRICHTON.  


You heard much discussion in the course of the day, as to the competency of the proof offered to shew that he was the author. The only evidence offered, was the testimony of strangers to the hand-writing of the defender, who compared the letter in question with letters admitted to have been written by him. No evidence was offered of persons who had seen the defender write, or who had corresponded with him; and no question on this subject was put to the factor, who probably knew his hand-writing.

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After enumerating the witnesses, his Lordship said—The inclination of my mind was not to admit the evidence; but when I find that, in the opinion of my brother, it is admissible by the law of Scotland, I am bound and willing to give up my own opinion.

The evidence having been admitted, you are to consider it, and give due weight to it; but before you do so, I think it proper to submit to you some general observations.

When evidence not the best, or even the next best, is given; I do not consider myself entitled to withdraw it from you entirely; but when stronger evidence is passed by, and no attempt is made to bring the best, the weaker evidence should be considered with all deliberation and attention, and an anxiety not to yield to it; but if you are of opinion that the thing is proved, then you must yield to evidence, whatever may be the result to the parties.

One of the engravers stated, that it was extremely probable that the letters were written by the same person; and on a question which I put to him, he said that the latter part of the anonymous letter appeared to him to be most freely written, and that that part most resembled the admitted letters. You will

take them with you, and examine whether you think him correct in saying so. To me the letter appears to be written in the same hand throughout.

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In all cases of this sort, we should be very cautious in drawing conclusions from mere probability; and the evidence of the other engravers shews upon what fanciful grounds the similarity is made to depend. One states the p as very peculiar, and you must look at this; another drops the p, and rests his opinion on other letters, which you will look at, and draw your own conclusion. This difference shews that there is no combination among the witnesses; but you will also take into consideration that they examined this letter under the impression that it was a fraudulent document.

There are many considerations which induce me to think that this species of evidence ought not to be submitted to you as proof that the defender wrote the letter; but I submit it to you, as it is evidence in this country.

If you are of opinion that the case is made out, you will then have to consider the damages. It is said they would bear hard upon the defender; but as I formerly stated, this

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v.  
CRICHTON.

is not a ground for giving a different verdict.

Verdict—"For the pursuer, damages L.5."

*Cockburn* excepted to the direction that the Jury were entitled to consider the evidence of the engravers.

*Jeffrey and Alison* for the Pursuer.

*Fullarton and Cockburn* for the Defender.

(Agents, *Burns and Allister*, w. s. and *Tennent and Lyon*, w. s.)

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AYR.

PRESENT,

LORD CHIEF COMMISSIONER.

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1820.  
April 12.

COCHRAN v. WALLACE.

Finding as to  
the multure  
payable by the  
tenants of a  
barony.

DECLARATOR of immunity from thirlage,  
and of being only liable in out town multure.

DEFENCE.—The miller only exacts the thirlage which has been exacted for time immemorial. Several other defences were also stated.

## ISSUES.

COCHRAN  
v.  
WALLACE.  


“ 1st, Whether the pursuers, who are  
“ tenants upon the barony of Corsewall, in  
“ the parish of Kirkcolm and county of Wig-  
“ ton, who are admitted to be thirled to the  
“ mill of Corsewall on said barony, have been,  
“ from and since the year 1787, by their  
“ leases or agreements for leases from the  
“ Earl of Galloway, then proprietor of the  
“ barony and mill aforesaid, bound to pay no  
“ higher rate of multure than 1s. 6d. per  
“ Galloway boll, or  $\frac{1}{2}$  part in kind, or  
“ thereabouts, in full of all demands, upon all  
“ the grain which they might have occasion  
“ to make into meal for the use of them,  
“ their servants, and cottars in their families;  
“ and whether the pursuers, since granting  
“ the leases, and during the period aforesaid,  
“ have paid no higher rates of multure than  
“ aforesaid? Or,

“ 2d, Whether, for the period of 40 years  
“ or upwards, the said tenants have paid as  
“ multure, at least, the  $\frac{1}{2}$  part for grind-  
“ ing;  $\frac{1}{4}$  part of a stone out of 16 stone  
“ for fanner dues;  $\frac{1}{4}$  part of a stone out of  
“  $2\frac{1}{2}$  bolls of corn for the kilnman; three-

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“ pence per boll of corn for kiln dues, and the  
“ dust of the whole for duster’s dues ; and a  
“ lock or bannock on each millder to the  
“ miller, upon the corns they had occasion to  
“ grind as aforesaid ?”

An Issue cannot be altered without consent of parties.

Before proceeding to trial, it was proposed to make an alteration on the second Issue.

LORD CHIEF COMMISSIONER.—I cannot alter the Issues, except by consent of parties. If the defender does not prove the second Issue, a verdict must go upon it for the pursuer ; but if the facts proved by the defender appear to be material, it is competent for me to order them to be indorsed on the Issue.

Competent to prove a general rate of multure throughout a district, on an Issue as to the rate payable at a mill within that district.

The first witness called for the pursuers was asked the rate of the out town multure at other mills.

Mr Campbell objected to this, and his Lordship at first intimated an opinion that the question was incompetent under the terms of the Issue, the Issues being as to the multure at a particular mill, which could not be affected by that paid at others, unless the pursuer would undertake to prove a general rate throughout the district.

*Campbell*, for the defender, then submitted



that there was no such term as out town in the Issue—that the Issue was limited to these particular farms, or at all events to this mill. We had no notice of a question as to any barony but this.

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*Ferguson.*—The Issues refer to the leases, and these again refer to *in* and *out* town mul-  
ture. We shall prove the in town not so high as the defender states the out town to be; and we are entitled to prove the general rate, leaving him to prove his specialty as to the superiority of his mill to the others.

LORD CHIEF COMMISSIONER.—It is most important that Judges should not admit incompetent evidence; but it is also most important that parties should not be turned round upon a point of this sort; and it is the proper leaning of Judges rather to admit than reject evidence.

At first it struck me that the evidence offered was proving *res inter alios*; but now it appears to me competent to prove, 1st, That there is a general rate in the district. 2d, The amount of that rate. Mr Campbell states that there is nothing of in and out town in the Issue, and that the Issue is confined to the contract between the parties. The terms of that contract are not expressly for the sums stated in the Is-

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sue, but for out town grain alienarly. These terms must have been known to the parties in 1786 and 1796; and the question is how the meaning of these terms is to be proved. The pursuers state that there is very little of the out town multure at the mill in question, and that they will support their plea by proof of a general custom.

I am of opinion that this proof is admissible, as it is not a proof of a particular transaction between other parties, but a proof of a general practice through a great district of country. What the effect of the proof may be is a question for the Jury, upon which I shall observe to them at the proper time.

In this case I think there is no surprise, as the miller ought to be ready to shew that 1s. 6d. was not the out town multure.

The deposition of a witness taken in another question between the same parties, inadmissible as evidence, even after the death of the witness.

*Campbell*, for the defender, proposed to give in evidence the deposition of a witness (since dead) in a question between the parties in an inferior Court; and stated, we are here free from the objection to proof of what a person since dead has said, as this is evidence upon oath, and the other party had an opportunity of cross-examining him.

*Ferguson*, for the pursuers, objected, and

referred to the case *Carleton v. Strong*, Vol. I. 30, but afterwards withdrew his objection.

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**LORD CHIEF COMMISSIONER.**—When a witness is dead, you may prove what he said ; and in a question of reputation, the same thing is competent. But here it is proposed to give in evidence the deposition of a witness in another cause ; and as the objection is not insisted on, perhaps it may be admissible. But it would have been more regular to have examined him by a commission from this Court. In *Strong's* case I do not think the proper reason is given for rejecting the deposition.

*Marshall*, for the pursuer, stated the history of the case, and of the law of thirlage. Being a restriction on liberty, the lowest mulcture must be taken ; *Ersk. II. 9. 20.*—Before 1787, this was a very heavy thirlage, but it was then much modified. The first Issue must be found for us ; and if, on the second, the defender proves any higher mulcture to have been paid, the Jury should specify it. The payment could not have been for 40 years, as the leases are only 33 years old.

*Campbell*, for the defender.—This is a simple question of fact. The pursuer has not


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proved the last part of the first Issue, which must therefore be found against him. On the second I shall prove more paid than is stated in the first Issue. I shall prove it for 33 years, and the old leases shew the payments before that period.

*Ferguson.*—On the first branch of the first Issue, I am not bound to prove any thing of kiln dues, but only as to multure.—*Skene v. Riddie*, 20th Dec. 1775. ; M. 16,062. Thirlage is an undeviating rate ; and if you find that the payments varied, you must find for me, as it is that of which I complain. If you find for me on this Issue, I am indifferent about the second. If I am bound to prove the first, the defender is bound to prove the second ; and his evidence does not prove that any of the *pursuers* paid it.

LORD CHIEF COMMISSIONER.—The history of this case may in some degree clear our way to the subject for consideration. It is evident that in 1787, Lord Galloway intended to alter the rate of multure, and to grant a great ease to his tenants. He did so with accuracy in the articles of roup ; but the matter is not stated with the same accuracy in the leases. The miller seems to have been a

party to this transaction, and the tenants complain that he has since taken more than he was entitled to take.

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There is here no question as to what the tenants are bound to grind; and the only question sent by the Court of Session is for the purpose of ascertaining the rate of the out-town multure. The rate stated by the pursuer in his summons is 1s. 6d.; and it has been proved, that that is now the proper compensation for the labour of grinding.

Evidence of the practice at other mills is no proof of the practice at this; but it is competent and most convincing evidence of the rate to which out-town multure had generally fallen; and it has been proved that the same rate had in some instances been paid at this mill. It appears to me that you may find the first branch of the 1st Issue in the affirmative: The second branch is the question the Court of Session have to determine.

*2d Issue.*—This is not a simple question of prescription, but a special question as to these tenants. If a miller is bound by a contract, he cannot set up a general prescription against it; and in this case, though proof may have been given of larger payments by others, I

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think you ought to limit the inquiry to whether the proof applies to these tenants.

The findings would then be, that they are not bound to pay more than 1s. 6d. per boll, though some instances of a higher rate have been proved; and as no evidence has been adduced on the second Issue, applicable to these tenants, you may on that Issue also find for the pursuer.

Verdict.—The Jury found, 1st, That the tenants were not bound to pay more than 1s. 6d. per boll, or the  $\frac{1}{3}$  part in kind; but that instances had occurred where more had been paid. 2d, That they had not paid for 40 years the dues specified in the second Issue.

*J. Ferguson and Marshall for the Pursuer.  
Campbell for the Defender.*

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 PERTH.

PRESENT,

LORD CHIEF COMMISSIONER.

 ROBERTSON  
 v.  
 FERGUSON
 

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 ROBERTSON v. FERGUSON.

 1820.  
 May 4.
 

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AN action of damages for executing diligence for the full amount of a debt after agreeing to accept of a composition, and for repayment of the balance.

Damages claimed for executing diligence for the full amount of a debt, after agreeing to accept of a composition.

DEFENCE.—The creditors did not accept of the offered composition.

## ISSUES.

The Issues were, 1<sup>st</sup>, Whether the defender accepted of a composition offered by the pursuer to his creditors?—2<sup>d</sup>, Whether the pursuer tendered good security? and Whether, after this offer, the defender pointed goods and effects of the pursuer?—3<sup>d</sup>, Whether the defender agreed to accept of the security offered?—4<sup>th</sup>, Whether the pursuer tendered payment of the amount of the composition?

**ROBERTSON**  
v.  
**FERGUSON.**

To entitle a party to give parol evidence of the contents of a written document, he must have called for production of the document.

The first witness called for the pursuer, was asked by the counsel for the defender, whether a state of debts was laid before a meeting of creditors?

**LORD CHIEF COMMISSIONER.**—If you called upon the other party to produce this document, and they refused to do so, you may give evidence of its contents, but otherwise the testimony is incompetent.

A witness not entitled to look at notes, unless made by him at the time the transaction occurred.

A witness, on his cross-examination, was about to refresh his memory by looking at a note.

**LORD CHIEF COMMISSIONER.**—A witness may speak from a note made at the time, but cannot look at notes made some time after. I doubt if you can examine the witness as to a meeting, the result of which was reduced into a solemn writing. If you intend to prove that all the pursuer's creditors acceded, you must produce and prove the writing, as the best evidence. The defender may then rebut this, by proving that others not contained in the writing, were creditors.

At the conclusion of the evidence for the pursuer, Mr Keay suggested that no case was proved.




**LORD CHIEF COMMISSIONER.**—This is certainly a very defective case. Things are not done at the proper time. Before bringing a case, a party ought to inquire whether he can prove it, and if he cannot, ought not to bring the action. Agents too ought to prepare their testimony earlier. In the present case there is some evidence, and you may make such remarks upon it as you think proper. There is *prima facie* evidence of good security having been offered, and there is evidence to go to the Jury on the tender of that security.

ROBERTSON  
v.  
FERGUSON.

*Murray* opened the case for the pursuer, and stated, that a composition was offered, and accepted by all; that good security was offered; and the Jury would judge whether it was not refused in the hope of obtaining an undue advantage.

*Keay.*—The pursuer was a year too late in offering the security. This was not execution of summary diligence; and it would be monstrous to subject the defender in damages for the fault of the pursuer. The first Issue is out of the question, as the defender was present. The question is, if good security was found? and all agreed that it was not.

ROBERTSON  
v.  
FERGUSON.



The cautioner was changed from the one first offered, which would have been sufficient to vitiate the agreement; and instead of a negotiable document, the pursuer offered one signed by a mark.

LORD CHIEF COMMISSIONER.—In this case, the pursuer complains that the defender pointed and sold his goods, after agreeing to accept of a composition. The answer is, that the composition was accepted, on condition that good security was found, and that all the creditors acceded. If these were the conditions, and not complied with, the original agreement was at an end.

As the agreement is established, the question is, whether the conditions were complied with? If a party enters into a composition to be accepted on good security, and no objection is stated in time, the security must be held good, unless the defender shews it bad; but if the security is changed, the burden of proof is shifted to the pursuer, and he must shew the security good. The objection to the bill offered is, that it is signed by a mark; and though a marksman may bind himself, it requires the subscription of witnesses.

The cautioner must not only be sufficient, but the document binding. I doubt if it was

proved that the cautioner was sufficient; and I state to you, as clear law, that this document is not binding, and therefore the security is not good. In these circumstances, you are to make up your minds whether the conditions have been complied with. On the third Issue, the fact of the agreement is made out; and if all the creditors were present and agreed, it is not necessary that they should all sign at the time, but might do so afterwards. But where is the evidence that all the creditors agreed, and signed at any time?

If the leaning of your minds is the same with mine, you will find for the defender; but it is only in point of law that you are bound by my opinion. The fact is entirely with you. If you find damages, I conceive they ought to be very small.

**Verdict—**“ For the defender on all the Issues.”

*A. Murray* for the Pursuer.

*Keay* for the Defender.

(Agents, *J. M'Gregor*, and *Ro. Cargill*, W. S.)

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MILLER  
v.  
MOFFAT.

PRESENT,  
THE THREE LORDS COMMISSIONERS.

1820.  
May 11.

MILLER v. MOFFAT.

An action for repetition of bank-notes stolen, and of multiplepoinding, to ascertain the right to three drafts upon London, said to be purchased with a part of the notes.

AN action for repetition of a balance of a sum stolen from the Paisley Union Bank, Glasgow, and for damages; and an action of multiplepoinding, at the instance of the City-clerk of Edinburgh.

ISSUES.

“ 1st, Whether, on the evening of the  
“ 13th day, or the morning of the 14th day  
“ of July 1811, or about that time, the de-  
“ fender, James Moffat *alias* M'Coul, did  
“ steal, or unlawfully abstract and carry off,  
“ or was art and part in stealing, or unlaw-  
“ fully abstracting or carrying off, from the  
“ office of the Paisley Union Bank in Glas-  
“ gow, cash and bank-notes, and bankers'  
“ notes belonging to the said bank, amount-  
“ ing in value to L.19,753. 4s. or there-  
“ abouts? And whether the defender still re-

“ tains, and refuses to restore to James Mil-  
“ ler, the pursuer, for and on account of the  
“ said Bank, a large portion of the said cash,  
“ bank-notes, and bankers’ notes, amounting  
“ in value to L.7644. 9s. or thereabouts?

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MOFFAT.

“ 2d, Whether the amount in value of  
“ L.19,753. 4s. in cash and bank-notes, and  
“ bankers’ notes, was, on the 13th and 14th  
“ days of July aforesaid, stolen, abstracted,  
“ or carried away from the office of the Pais-  
“ ley Union Bank Company at Glasgow  
“ aforesaid, and whether the said defender re-  
“ ceived the whole, or any, and what part  
“ thereof, knowing the same to have been  
“ stolen; and whether he still retains, and  
“ refuses to restore to the said James Miller,  
“ for and on account of the said Bank, a  
“ large portion of the said cash, bank-notes,  
“ and bankers’ notes, amounting in value to  
“ L.7644. 9s. or thereabouts?

“ 3d, Whether three bills of exchange, one  
“ dated 4th March 1813, for L.540, drawn  
“ by the British Linen Company on the  
“ house of Smith, Payne, and Smith, bankers  
“ in London, payable to James Martin, at  
“ forty days’ sight; one dated 5th March  
“ 1813, for L.31, drawn by the British Li-

MILLER

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MOFFAT.

“nen Company on the said house of Smith,  
“Payne, and Smith, payable to the said  
“James Martin, at fifty days’ sight; and one  
“dated the 5th March 1813, for. L.400,  
“drawn by the Commercial Banking Com-  
“pany of Scotland, on Bruce, Simpson, Freer  
“and Company of London, to the said James  
“Martin, at forty days sight; all in the ac-  
“tion of multiplepoinding brought at the in-  
“stance of Alexander Callender, Depute  
“City-clerk of Edinburgh aforesaid, admit-  
“ted to have been purchased by the defender  
“the said James Moffat *alias* M’Coul, from  
“Banking Companies aforesaid, amounting  
“in all to L.991, were purchased by him with  
“a part of the cash, bank-notes or bankers’  
“notes, stolen or unlawfully abstracted or car-  
“ried off by him and others as aforesaid, or  
“in the stealing or unlawfully abstracting or  
“carrying off of which, he was art and part,  
“or of other cash or notes obtained as the  
“proceeds of the notes or cash so stolen or  
“abstracted; or, whether, having received  
“the same, knowing them to have been sto-  
“len, he did apply part thereof, or of other  
“notes or cash so stolen or abstracted, in pur-  
“chasing the bills of exchange aforesaid, ad-

“mitted by the said James Moffat *alias*  
 “M'Coul, defender, to have been purchased  
 “by him ?

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 MOFFAT.

“*Schedule of damages claimed by the Pursuer.*

“I. - - - L.19,758 4 0

“Under deduc-

“tion of L.11,988 15 0

“And of 970 0 0

————— 12,908 15 0

—————  
 L.7644 9 0

“with interest upon the said sum of L.7644  
 “9s., and provisionally with deduction of  
 “L.991, contained in the drafts, the subject  
 “of the multiplepoinding.

“II. L.1500 of damages.”

In this case an application was made for  
 an order for the defender to attend the trial.

*Jeffrey*, for the pursuers.—This is neces-  
 sary, as it may be impossible to identify him,  
 as he went by different names.

LORD CHIEF COMMISSIONER.—By what  
 process can we enforce the order ?

*Jeffrey*.—We ask an order in the first in-  
 stance, and if that is not effectual, he must  
 pay the costs occasioned by putting off the

1820.  
 14th and 19th  
 February.

Circumstances  
 in which the  
 Court would  
 not interfere,  
 to compel a  
 defender to ap-  
 pear in Court  
 on the day of  
 trial.

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trial. The general principle of law is, that the party is in Court; and there is no doubt the Court have power to compel this, or hold him confessed. A witness is compelled to attend.

*Alison*, for the defender.—On a diligent search, I have not been able to find a single instance of this being done. The defender is most anxious to be present, and to bring this case to an end; but he does not choose that it should go to the Jury with an order of this sort against him; and it is possible that he may be called away by other business. We hold, judicial examination is incompetent in such a case, though the Court of Session allowed it in this case.—*Gordon v. Campbell*, 22d Dec. 1819.

LORD GILLIES.—Is there any precedent for such a proceeding, or any case where the foundation of the action was an alleged criminal proceeding? The defender comes here, and we must presume him perfectly innocent. Would it not be a strong measure to grant an order, as if there was a presumption that he is about to leave the country? If the pursuer gives him notice, and he does not attend, this might be a reason for putting off the trial.



In the Commissary Court, though the party attends, I never knew an order for attendance.

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MOFFAT.

LORD PITMILLY.—I recollect a case, where the criminal proceeding was stopped till the civil suit was brought. In this case, I confess the bent of my opinion is, that if the ends of justice require it, we have power to make the order; but I am uncertain if disobedience would be a contempt.

LORD CHIEF COMMISSIONER.—The singular nature of this case arises from not having proceeded with the criminal case first. It appears to me extremely difficult to know how this order could be enforced, if we granted the order. It may, however, be intimated to the defender, that he is expected to attend; and it will be matter for observation to the Court and Jury, if he does not. Mr Alison speaks after a diligent search; but he only speaks negatively: on the other side no case is mentioned. I do not think we have power to make the order, as there is no authority given by which to enforce it. Holding the party confessed would be the way of enforcing it in the Court of Session; but our only authority is the Act 1819, 59. Geo. III. c. 35, § 28, and that is merely to compel parties to proceed with their cases.

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v.  
MOFFAT.

An affidavit was put in ; and on the 20th February, before proceeding to the trial of another case, the LORD CHIEF COMMISSIONER stated, If this affidavit had been put in at first, it might have saved two attendances upon the Court. This is an application for an extraordinary interference of the Court ; and though, in the course of 35 years practice, I never heard of such an application, and do not believe that any such has been made during the long practice of trial by Jury in England, yet I hold myself bound to yield to the law of this part of the country ; and what I heard created doubt in my mind whether it might not be competent here. But on the matter contained in the affidavit, we are unanimously of opinion that there is not enough stated to entitle the pursuer to this order. If it was granted in this case, the application might be made in every case. But it is unnecessary to enter into the reasons of the rule, as, with sufficient activity, all may be got which is necessary to the ends of justice in this case.

In opening the case, Mr Cockburn was proceeding to state the conduct of the defender,

*Grant*, for the defender.—The pursuer is not entitled to state criminal charges against the defender. His character is not the subject of discussion here.

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v.  
MOFFAT,  


*Jeffrey*.—I admit that we are not entitled to prove what is reported of him ; but we are entitled to shew who his companions were, to make out the probability of his doing what is charged against him, and as contradicting his declaration as to his employment.

*Grant*.—All authorities agree that you are not entitled to prove a person in such a situation, or of such a character that it is likely he was guilty of a criminal act.

LORD CHIEF COMMISSIONER.—When the evidence is offered, you may object to any part of it. The pursuer cannot know exactly what will be admitted. From the hands in which the case is, there can be no doubt it will be stated with propriety ; and without allowing the statement to proceed, we cannot understand the case. But the statement will not influence the Court or Jury in any thing that is not allowed to be proved.

Mr Cockburn was about to read from the declarations by the defender.

In opening a case for the pursuer, his counsel allowed to read judicial declarations by the defender.

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v.  
MOFFAT.

*Grant.*—We mean to object to the production of these in evidence; and Mr Cockburn ought therefore only to state the import of them, as of the testimony of the witnesses.

LORD CHIEF COMMISSIONER.—It is difficult to say that the Court should interfere to prevent the counsel from using their discretion as to reading declarations solemnly made, and taken down in writing, upon the mere possibility that the Court may reject them, and with the possibility also, that if admitted, he may have no opportunity of observing upon them.

When the declarations taken at the time the defender was apprehended on suspicion of the crime, were given in evidence, Mr Grant at first objected, but afterwards admitted them to be authentic.

LORD CHIEF COMMISSIONER.—They ought regularly to be read now; but if the passages read by Mr Cockburn are marked, it may be sufficient if I state them to the Jury. This is not a document to be given to the Jury, but to be taken on statement, as the testimony of the witnesses.

When the declaration before Lord Gillies was produced,

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MOFFAT.

*Grant* objects, not to the authenticity of the document, but to such a document being evidence in this cause. Lord Gillies will recollect, that after heaping all the abuse they could on the defender, they were reduced to refer the whole to the declaration of the party. Lord Gillies doubted, and refused to examine him as to a capital felony.

The First Division altered this interlocutor to a certain extent; but it is perfectly clear, that in a civil court a man is not bound to state what may be used to convict him of a capital felony. Many cases might be quoted both in England and Scotland.

*Jeffrey*.—These declarations were taken in *this* case.

LORD CHIEF COMMISSIONER.—We do not require any authorities, or any reply. The competent Court has ordered this examination, and it has been solemnly and regularly gone into. If the party thinks it necessary to refer to this as evidence, we must receive it.

*Grant*.—We must refer to the peculiar situation in which we are placed as our apo-

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MOFFAT.

logy ; we would have advised an appeal against the examination, but that was incompetent, and our only mode of redress is by now tendering a Bill of Exceptions.

LORD CHIEF COMMISSIONER.—Adjust the bill, and we shall receive it before we leave the Court.

A witness (Porter to the Bank) having stated that he saw a parcel in the Bank, with a note upon it ; was asked if he copied the note ?

*Grant* objects.

LORD CHIEF COMMISSIONER.—It is certainly competent to ask if he copied the note. It is quite a different question if he will be allowed to speak to his copy.

Parol evidence competent of what a person since dead had said ; but incompetent if the person was interested at the time of making the statement.

The witness having stated that Mr Likely of the Bank, who died about five years ago, had gone to London, and returned, he believed, with a number of the stolen notes, was asked ; did he tell you ?

*Grant* objects. This is hearsay, and of a person interested, who could not have given evidence.

*Jeffrey*.—This was an official person, and

as such, his evidence would have been admissible, had he been alive. The statement was made when there was no suit depending, and he is since dead.

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v.  
MOFFAT.


*Grant.*—If a person ceases to have an interest before the trial, it has been held, but not uniformly, that he might be examined; but was it ever heard of that his testimony, at a time when he was interested, could be reared up as evidence? If an incompetent witness had been examined on one trial, could what he then said be proved as evidence in another case?

With all deference, I shall on every occasion argue, that hearsay is totally inadmissible.

LORD CHIEF COMMISSIONER.—I hold it quite clear that hearsay is inadmissible by the Law of Scotland; but if the party is dead, what he said may be proved as a circumstance of evidence, which forms an exception to the general rule.

As to the objection of interest, that appears to me a question of importance. If this had been a criminal prosecution, this would have been admissible for the ends of public justice; but here it is an action to recover a sum of money, and is a matter in

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which this person, if alive, would have been interested. We must see what they mean to prove, as it may be far short of what we suppose, and may differ, as this is a private company, not a corporate Bank. If this person had been alive and interested, you could not have called him, but you might have called a witness to prove the sum he brought back from London. In all cases, I am most anxious to lay down accurate rules ; but this is a case of greater anxiety, from its very peculiar complexion ; for though it is for a civil debt, the evidence is of a criminal nature. The question as to proving what a person, since dead, has said, I hold as disposed of ; and the question is, if the interest is such as to make the evidence inadmissible.

Though disqualified as a partner of the Bank, it is said, that as an officer, his evidence must be taken. What was the situation and character in which this gentleman acted in going to London, &c. ? Was he then acting as cashier, or merely as a messenger from the Bank, and in a character in which any of the other partners might have been employed ? This witness is asked to speak to statements made by this person while acting in this character. It is said, as his heirs have



no interest, he is in the situation of a witness with a release; but it is a sufficient objection, that, at the time he made the declaration, he was interested. If we allow any part of what he said to be proved, we must allow every circumstance, even to his having received the money from the hands of the defender, if he got it there. We can only look to his situation at the time he made the statement, and at that time he was interested.

MILLER

MOFFAT.

A partner of Sir W. Forbes & Co.'s bank was called.

*Grant* objects.—The Company are cautioners to the Magistrates, in case we succeed in recovering the three drafts; *Alison v. Gordon*, 17th December 1701. The same is law in England; 1. Phillips, 52; 1. T. R. *Carter v. Pearce*.

The counsel for the pursuers withdrew the witness, till a discharge could be got.

After a witness was sworn, and partly examined, Mr Grant objected, that they had only got notice of his being a witness the night before.

An objection of want of sufficient notice that a witness is to be called, ought to be made before the examination is commenced.

MILLER

v.  
MOFFAT.

The Court will  
not compel a  
party to shew  
himself in  
Court during a  
trial.

**LORD PITMILLY.**—You are too late with your objection.

The counsel for the pursuer wished this witness to see the defender.

**LORD CHIEF COMMISSIONER.**—The Court have no power to compel him to attend; but they have sent him notice that you wish it.

An objection was taken to two articles of the condescendence, and part of a third, with the answers, which were given in.

**LORD CHIEF COMMISSIONER.**—The condescendence certainly is not evidence, but must be received, as the answer is not intelligible without it.

Circumstances  
in which the  
copy of a note  
entered in the  
books of the  
office at Bow-  
street was al-  
lowed to be  
read.

Vickery, the Bow-street officer, in the course of his examination, stated, that in a pocket-book found on Huffy Whyte, there was a note which was copied into the books of the office, and he afterwards compared it. He had searched for the original, but could not find it, and thought it probable it had been returned to Whyte.

*Grant.*—They have not proved that the memorandum is destroyed; and it is not ours, nor in our custody.

**LORD CHIEF COMMISSIONER.**—If this had been offered at an early stage of the cause, the objection would have had much force; but they have given so much evidence, and laid their ground so strong, to connect these persons with each other, and with this memorandum, that I think it is admissible in the circumstances of this case.

MILLER  
v.  
MOFFAT.

The witness then read from the book, and stated that Whyte had been executed.

**Grant.**—This is hearsay, and inadmissible, though the person is dead. In a case of this nature we must proceed according to the strictest rules.

Parolevidence  
not sufficient  
to prove that  
a person was  
convicted of a  
capital crime,  
to the effect of  
excluding  
proof of state-  
ments made  
by him.

**Jeffrey.**—There is nothing so clear as that this is admissible in a civil court.

**Grant.**—This is the hearsay of a person I have proved a convicted felon.

**LORD CHIEF COMMISSIONER.**—You have not proved him so to the effect of excluding his testimony.

**Grant.**—If the witness had been alive, and offered, I must then have produced a conviction; but brought in this way, I could not be prepared for it. I have proved it in the same way they proved him dead.

MILLER  
v.  
MOFFAT.



*Jeffrey.*—They admit that if Whyte were here, they must have produced a conviction, and are they on surmise to cast this evidence?

LORD CHIEF COMMISSIONER.—We think this evidence admissible; but if you ask our opinion of it, we think it of very little weight. In England, the civil action merges in the felony; but here we must treat this as a civil case; and there is no doubt that there is a ground of action, and even for damages. If the case were properly before us, there is really no point; and it is on the manner in which it is brought forward, that my only doubt rests. It comes here by a side-wind, and it is said that the other party had no notice of it. It is said, on the other side, to be proved by another witness, that Whyte was a convicted felon. I have already stated my opinion of the weight of this evidence; but if Mr Grant thinks this a surprise, he may move for a new trial on that ground. This is certainly not evidence of the conviction; for, though it may drop from all the witnesses, that a person escaped from the hulks, yet, on examination of the record, it may appear that the conviction was irregular. Here the question is, if, under all the circumstances,

we are to admit evidence of what this person said; and in my opinion, we ought to admit it.

MILLER  
v.  
MOFFAT.

**LORD GILLIES.**—The evidence of the conviction was given by a different witness; and Mr Jeffrey most properly objects, that the other party wish to reject that evidence, but to take the benefit of his testimony, to discredit his witness. Perhaps, however, Mr Jeffrey ought to have given some notice that he meant to bring this evidence.

In the course of the examination, Mr Grant objected, that there was no evidence of Whyte's death; but the witness having stated that he knew he was convicted,—that report said he was hanged,—and that he had not seen him since, his Lordship held this to be *prima facie* evidence of the death.

Circumstances  
held sufficient  
to prove a per-  
son dead.

A person who had acted as attorney for the defender being called, was warned by the Court, that he was not to state any thing he had from the defender in his character as attorney.

The bank of Sir William Forbes & Co. being released from their cautionary obligation, the partner of the company was called,

MILLER  
v.  
MOFFAT.  
~~~~~

and stated the amount of the notes sent to the Paisley Union Bank, and that a letter was written stating this.

Grant.—This is no evidence against the defender, and a letter is not even evidence of the fact.

LORD CHIEF COMMISSIONER.—This is no evidence against Moffat, but it shews the amount sent to the Paisley Union Bank, and is to be taken in connection with the other circumstances.

Cockburn, for the pursuer.—The simple questions are, Whether the defender robbed the Bank? or Whether he received the notes, knowing them to be stolen?

There is no direct evidence on the subject; but by a train of circumstances we shall *demonstrate* that he robbed it.

Grant, for the defender.—This is a most singular case, and such an one as I never expected to argue in a civil court; but as it is here, we must sift the evidence as if we were trying this man for his life. Such a case would not have been allowed in England, and the conduct of this bank is highly objectionable. You must hold that they stipulated not to prosecute for this sum.

The Court always lean to the admission of evidence, and therefore allowed proof of the persons with whom the defender associated ; but the Jury are not bound to believe it ; and except the partners and clerk of the Bank, there is not one uncontaminated witness. With respect to what was proved to have been said by Whyte, I must beg of you to wipe it entirely out of your minds ; for had he been alive, his evidence could not have been received.

MILLER
v.
MOFFAT.



LORD CHIEF COMMISSIONER.—This case has been one of considerable length in evidence ; but now that that is concluded, it may be shortly stated. Before going farther, I would warn you that we have nothing to do with the conduct of the parties, except so far as it relates to the Issues before us. We are not to investigate the conduct of the Bank, nor are we to try the defender for a crime, but must look to the Issues before us.

This is a case of circumstances (here his Lordship stated them), and you must judge from the whole, whether it is made out against the defender. We had an important question to consider, as to the competency of proving

MILLER
v.
MOFFAT.
~~~~~

statements by Whyte ; and I am still of opinion that we were right in admitting the evidence ; but though legally and necessarily admitted, it is still for you to consider the weight due to it. In proving what a person since dead had said, there is always the disadvantage that there are no means of cross-examination. But if the law is, as we know it to be, that hearsay of such a person is admissible, then this must be held sufficient notice to the opposite party, to bring the best evidence to shew that the dead person would have been an incompetent witness. You have then the testimony of Whyte's widow and another witness, as to confessions by Whyte, and of Moffat knowing the whole ; and there was nothing appeared to lead us to doubt the truth of what she stated, though you must take into view the persons with whom she was accustomed to associate. You have the defender also, in his declaration, stating himself to be a merchant, though it is proved that he never was so.

On the three Issues, you must consider whether there is not sufficient to satisfy your minds that these bills were purchased with the notes taken from the Bank. If you find for



the pursuer, it is for you to assess the damages, in doing which, you will attend to the schedule.

MILLER  
v.  
MOFFAT.

Verdict—"For the pursuer on all the  
"Issues, but found no damages due."

*L'Amy, Jeffrey, and Cockburn, for the Pursuer.*

*J. P. Grant and Alison for the Defender.*

(Agents, *James Smyth, w. s.* and *William Jamieson, w. s.*)

==  
PRESENT,  
LORD PITMILLY.  
==

HENRY v. EVANS.

1820.  
June 26.

DAMAGES for assault.

Damages for  
assault.

DEFENCE.—A denial of the statement;  
and a plea that, the defender's estate being  
sequestrated, the claim is incompetent.

ISSUES.

"1st, Whether, on or about the 4th day  
"of January 1816, on the shore of Leith,

HENRY  
v.  
EVANS.

“ the defender did assault and strike the pursuer, to the injury and damage of the said pursuer?—or,

“ 2d, Whether the pursuer did first assault and strike or push the defender?

“ Damages laid at L.1000.”

Malice was objected to a witness, and he was examined *in initialibus*.

LORD PITMILLY.—You ought to explain what you mean to prove. I understand the witness to have said that he has no such malice as would lead him to state what is not true.

It was then stated that he had expressed a wish to ruin the defender, upon which the witness was withdrawn.

Proof of an assault upon the party not sufficient to disqualify a witness.

When the witness was again offered, Mr Jeffrey said, that he would prove that he had assaulted the defender in 1817.

LORD PITMILLY.—You have stated nothing sufficient to disqualify the witness. What you state only goes to discredit him; and you have proved it in the best way, by his own evidence; and that evidence will go with all the other evidence, to the Jury.

*(To the Jury.)*—There are two questions here : Whether the defender assaulted the pursuer ? or Whether the pursuer struck first ? From the form of the Issue, the defender is put to prove his justification ; but if you make up your minds on the first Issue, it decides the case.

HENRY  
v.  
EVANS.  
~~~~~

You must attend to the very commencement of this case, and particularly to the clear, satisfactory, and strong evidence of the only witness who saw the first blow. You saw the witness ; and it is one excellence of this mode of trial, that you see the witnesses. It is law that one witness is not sufficient ; but when there are circumstances supporting that evidence, the Jury must consider it ; and in this case I do not think there is any ground for the objection.

There is here no proof of justification ; and you must take the whole facts into consideration ; and in fixing the amount of damages, you must give them as compensation to the defender, not punishment of the pursuer.

Verdict for the pursuer, damages L.50.

J. A. Murray and Cockburn for the Pursuer.]

Jeffrey for the Defender.

(Agents, James Heriot, w. s. and John Thorburn.)

HENRY
v.
EVANS.

1821.
Jan. 31.

Judgment entered up for the full sum found due by a verdict, not for the dividend due by the defender to his creditors, under a composition contract.

LORDS CHIEF COMMISSIONER AND PITMILLY.

Jeffrey moves, that as the defender had entered into a composition contract, judgment should be entered up only for the dividend on the sum found by the verdict, and also on the expences. If this is not done, we have no opportunity of bringing the question under the consideration of the Court of Session, by Bill of Suspension.

J. A. Murray.—The bankrupt has no right to make this motion; he says he was discharged three years before the Issues were tried.

LORD CHIEF COMMISSIONER.—There is a great deal in the objection, both on the general purview of the statute 59. Geo. III. c. 35. § 19. and the particular words, which are strong: viz. That the judgment shall be equally effectual as an extracted decree of the Court of Session, which goes to exclude a Bill of Suspension; and under this clause the judgment must be in terms of the verdict. This relieves us from going into the merits;

but it is a satisfaction to my mind, that I do not consider the debt constituted till judgment is pronounced.

HENRY
v.
EVANS.

LORD PITMILLY.—I am of the same opinion. I thought a Bill of Suspension might have been competent, but I am relieved on the ground stated; and if we are to go to the merits, I agree that the debt is only constituted at the date of the verdict.

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PERTH.

PRESENT,

LORD CHIEF COMMISSIONER.

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HENDERSON v. GARDYNE.

1820.
September 27.

DECLARATOR of right of property.

DEFENCE.—The ground in question was common to the pursuer and defender.

Found that a piece of ground had been possessed exclusively by the pursuer and his predecessors, for forty years.

ISSUE.

“ Whether, for forty years and upwards,
“ previous to the 10th day of April 1818, the

HENDERSON
v.
GARDYNE.



“ pursuer, William Henderson of Grange, of
 “ Barry, and his predecessors and authors, or
 “ their tenants, or persons deriving right from
 “ them, have possessed, as his exclusive pro-
 “ perty, the small *brae*, or piece of ground,
 “ situated in the parish of Barry, and county
 “ of Forfar, being about 150 feet in length,
 “ and 15 in breadth at its broadest part,
 “ situated at the south-eastern extremity of
 “ the field called Lawshade, of Grange, of
 “ Barry, the property of the pursuer; and
 “ bounded on the north and west by the said
 “ field; on the east, by the road leading
 “ from the village of Barry to Barrymuir;
 “ and on the south, by the lands belonging
 “ to the heirs of Alexander Hunter of Bals-
 “ kelly? or, Whether the said *brae* has been
 “ possessed as the common property of the
 “ pursuer and defender?”

A witness ex-
 cluded, there
 being an error
 in the chris-
 tian name in-
 serted in the
 list.

The first witness called for the defender,
 was Mrs Marjory (Margaret) Mill, residing
 at Monifieth.

Jeffrey.—There is no such person in the
 list of witnesses.

Cockburn.—The names are the same, but
 she is sufficiently designed as Mrs Mill, re-
 siding at Monifieth.

LORD CHIEF COMMISSIONER.—The principle on which lists are given is, that the party must have such notice as will afford him an opportunity of inquiring into the character of the witness.

HENDERSON

v.
GARDYNE.

In the circumstances of this case, the inquiry might have been made, and the witness discovered, without much trouble to the agent; but in a populous parish it might be impossible to make the inquiry; I therefore cannot say that she ought to be examined. This case has been long enough in dependence, for the agent for the defender to have ascertained correctly the names of his witnesses; and every one knows that Margaret and Marjory are not the same name.

Mr Jeffrey objected to reading the evidence of a witness who had been examined on commission. The Lord Chief Commissioner referred to Lord Fife's case, Vol. I. p. 92, as directly in point.

An objection was taken to another witness, that the list in which his name was contained had been served on the pursuer's agent, within eight days of the trial.

LORD CHIEF COMMISSIONER.—The Act

A witness excluded, the list in which his name was inserted not being served on the opposite agent eight days before the trial.

HENDERSON
v.
GARDYNE.

of Sederunt appoints the lists to be served four and eight days before the trial; and as there is no specialty in the present case, all the principles apply. It is only in a case of surprise, or some extraordinary circumstances, in which the Court would exercise the power given by the Act of Sederunt.—*Whyte v. Clark*, Vol. I. p. 235.

A witness admitted notwithstanding a slight error in the name of her place of residence.

A witness being examined *in initialibus*, stated that she was servant to A. B. at *Dey-house* or *Dearws*. An objection was taken, that in the list it was called *Dey*.

LORD CHIEF COMMISSIONER.—This is quite different from the case just decided. The error in the name of the witness might mislead, but I do not think the inaccuracy here founded on could. This appears to me to be drawing too fine, but if I am wrong in admitting the witness, gentlemen know how to get it put right.

The deposition of a witness in a question before a Sheriff, relative to the same piece of ground, admitted as evidence, the witness being dead.

In a possessory question before the Sheriff, as to this piece of ground, a witness had been examined, who was since dead. On his deposition being produced,

Jeffrey.—It must first be proved that it was sworn, who were present, &c.

Cockburn.—This is a judicial proceeding.

HENDERSON

v.

GARDYNE.



LORD CHIEF COMMISSIONER.—This is the original examination, and contains the signature of the Judge. This must be held true, unless disputed; and it is admitted that it is not forged. There was much discussion before admitting proof of what a dead person had said; but it was decided that this is an adminicle of proof, though not much to be relied upon. It was admitted in the cases of Lord Fife, and Clark and Thomson, Vol. I. p. 95, and p. 181; and under the authority of these cases, I must admit it here.

Forsyth opened the case, and stated the facts he would prove; but maintained that he was not bound to prove an absolute exclusive possession, as there might be trespasses by the other party.

Cockburn maintained, that the Jury were bound to decide according to the evidence, whether the possession was exclusive, or whether it was common.

Jeffrey.—The defender has not proved a joint possession; and the right of the pursuer is therefore undoubted. He has a manifest interest; and the claim of the defender is vexatious.

HENDERSON
v.
GARDYNE.

LORD CHIEF COMMISSIONER.—It is to be regretted that so much time is occupied by a subject of so small value; but parties are entitled to a decision of their rights, and we must hope that the decision will put a final termination to this dispute.

In cases of this sort, there cannot be evidence only on one side, as there must be some sort of intrusion, otherwise a party would never think of making a claim. On weighing the whole evidence, you must say whether the possession was exclusive; and it will assist in your consideration of the parol testimony, if you attend to the evidence of facts and circumstances, and whether the acts done were inconsistent with the idea of the property being common.

If you think it proved that any part of this brae was ploughed by the pursuer, without interruption, or that he was allowed to put off the cattle of the defender, and put on his own, this is inconsistent with a commonable right.

Verdict for the pursuer.

Forsyth and Jeffrey, for the Pursuer.

Cockburn and W. R. Robinson, for the Defender.

(Agents, *D. Fisher, and James Carnegie, w. s.*)

Forsyth and *Jeffrey* moved for the expence incurred by the agent in attending the view, and also for part of the fees paid to counsel, both of which had been struck off by the Auditor.

HENDERSON

v.

GARDYNE.

1821.

May 16.

The expences of a law agent in attending a view, and part of the fee paid to counsel, disallowed.

LORD CHIEF COMMISSIONER.—It is unnecessary for Mr Cockburn to answer, though this is both a delicate and important question. In this Court, there have been more views during six years, than in the home circuit in England for 30 years; and in the Report to Parliament, I have stated what appeared necessary on the subject. At a view there ought not to be any discussion; it ought to be confined to the shewer; and therefore there ought not to be any charge for the attendance of a law agent.

As to the fees to counsel, the question is delicate and difficult, as the bar do not travel circuit; and there is an increasing disposition to try cases here.

But the Court mean to confirm what has been done; and they wish to establish the distinction of an account as betwixt party and party, and party and agent, which the auditor

HENDERSON
v.
GARDYNE.

has been attempting to fix ever since his appointment, and which is essential in this Court.

GLASGOW.

PRESENT,
LORD CHIEF COMMISSIONER.

1820.
Oct. 2.

SMITH v. PULLER.

Question as to
the liability of
a person for the
debts of a mer-
cantile com-
pany.

DECLARATOR to have it found that the defender was a partner of, and liable for the debts of, George Puller & Co.

DEFENCE.—A denial that the defender was a partner, or is liable for the debts of the Company.

ISSUES.

“ 1st, Whether, in the business of bleach-
“ ing carried on at Gateside, near Barrhead,
“ in the county of Renfrew, from the year
“ 1816 to the year 1819, under the partner-
“ ship firm of George Puller & Co. it was un-
“ derstood between the defender, William

“ Puller, and the other persons who are al-
“ leged to have constituted the said partner-
“ ship, that the said William Puller was a
“ partner of the said company from or about
“ its commencement in 1816; and whether
“ they considered that he so continued until
“ or near to the period of its bankruptcy in
“ 1819?

SMITH
v.
PULLER.



“ 2d, Whether the said defender, during
“ the subsistence of the said company, was
“ in the custom of interfering with and
“ taking a part in the management of the
“ business and concerns of the said company
“ as a partner thereof, or acted as a partner
“ of the said company?

“ 3d, And Whether the said defender did
“ admit himself to be, or hold himself out to
“ certain persons, who supplied the said com-
“ pany with various articles used in the ma-
“ nufacture, as a partner of said company?”

George Puller, the son of the defender, was ostensibly the partner of the company; but it was alleged that the defender drew the profits, and managed the business. The company was sequestrated, and this action was brought to ascertain whether the defender was a partner.

SMITH

v.
PULLER.

Declarations
taken under
the Bankrupt
Act not evi-
dence.

The first pieces of evidence offered were the declarations of the other partners, when examined under the Bankrupt Act.

More, for the defender.—By the statute these cannot be used, except in cases of fraudulent bankruptcy.

LORD CHIEF COMMISSIONER.—You need not labour this point; I am quite satisfied. The proceeding is an *ex parte* one, and cannot be laid before the Jury.

Pleadings bearing to be in name of a party, allowed to be produced, the counsel undertaking to prove that they were authorised by the party.

A process was then offered, to shew that the pleadings were in name of the defender.

More. objects.—The pursuer must first shew that they were given in by authority of the defender.

LORD CHIEF COMMISSIONER.—These pleadings will not go to the Jury, unless the defender gave instructions to put in the pleadings. Mr Cockburn proposes to shew, that certain things were done; and he undertakes to prove, that these things were done with the knowledge and approbation of the defender, and the documents must be afterwards withdrawn, if he fails in his proof.

In proving a person to have acted as a member of a mercantile company, competent to prove statements by another partner of the company.

The first witness was asked what George Puller said as to William being a partner.

More.—George was a partner, and could not have been a witness in this cause. His declaration, therefore, cannot be proved, except made in presence of the defender. It does not fall under any of the Issues. I could not cross-examine.

SMITH
v.
PULLER.
—

Cockburn.—In a case for detecting concealed partners, I am entitled to prove the declarations of partners, whether dead or alive.

LORD CHIEF COMMISSIONER.—According to the construction contended for by Mr More, it would only be competent to prove the partnership by direct evidence; but the fact to be found by the Jury is to be inferred from the *res gestæ*. The objection to examining a partner is, that he is interested to increase the fund. The question here is, Whether that interest applies to the facts proposed to be proved? Any thing done by G. Puller might have been proved to shew that the defender was a partner, and why may not his words be proved; they are part of the *res gestæ*. How they may be connected with the party, and whether they may be fit to be stated to the Jury, is a different question; but I am bound to admit this evidence, and it is

SMITH
v.
PULLER.

quite clear of the objection of interest. As an admission by a party, it would be quite competent, even if the law of Scotland was as I wish it, on the subject of declarations of a dead witness.

A debt constituted by writing, or a conveyance of a debt, must be proved by writing, not by parol evidence.

A witness, on his examination *in initialibus*, stated, that he had been a creditor of the company, but had conveyed his claim to the trustee on his sequestrated estate.

More objects.—He is interested. The conveyance of his whole property can only be proved by writing.

Cockburn.—His interest is at an end by the conveyance. The conveyance is proved by the same evidence as the debt.

LORD CHIEF COMMISSIONER.—The defender may undoubtedly prove that a debt was due to the witness, and the pursuer may prove that this debt was conveyed to another; but if the pursuer proves that the debt was constituted by writing, then the defender must produce that writing, and in that case the debt must both be proved and taken away by writing. But as the debt may be constituted without writing, it was competent for the defender to prove it in the manner he has

done. The conveyance, however, could only be by writing; and to prove it, the pursuer must produce that writing.

SMITH
v.
PELLER,


This witness admits that, by transactions in business, he became a simple contract creditor; to prove a debt of this description, writing is not necessary. The interest being thus established, it is wished to do away the objection, by proving that the debt is conveyed to the trustee. This conveyance can only be effected by writing; and the party wishing to prove the conveyance, must produce the writing.

An objection was taken to a question put to another witness, as to an action brought against her.

Parol evidence incompetent to prove by whom an action was brought.

LORD CHIEF COMMISSIONER.—It is competent to ask the witness to state from memory, whether an action was brought; but if you go a step farther, you must produce the summons. You may also ask her to state who were pursuers; but if it is to be rested on as a fact, her answer will not prove it; but it must be proved by production of the document.

In re-examining a witness, he was asked

SMITH
v.
PULLER.

if he suspected that the defender was a partner.

More objects.

LORD CHIEF COMMISSIONER.—On re-examination, I hold it fair enough, in this stage of the examination, to ask a witness his suspicions, with a view to asking him the grounds of that suspicion. His suspicion, however, goes for nothing, unless it is followed by a statement of the grounds on which it rests.

Circumstances
in which a
party may dis-
credit his own
witness.

Mr Cockburn insisted that one of his witnesses should answer a question, or he would move the Court to send him to prison; and on a similar attempt, to discredit another witness, Mr More objected.

LORD CHIEF COMMISSIONER.—I feel a difficulty in allowing you in this manner to discredit your own witness, and I much regret the time that is lost by men of business not making themselves acquainted with what the witnesses can say; that calling such witnesses may be avoided. It is a very delicate matter to allow a party to discredit his own witness; but an unwilling witness must be treated in some respects as one from the enemy's camp.

A witness not appearing (he sent an affidavit that he knew nothing material of the matter), Mr Cockburn moved that some proceeding should be had against him.

SMITH
v.
PULLER.

When a witness does not appear at a trial, proceedings to be had against him ought to be moved in the following Term.

LORD CHIEF COMMISSIONER.—He must be called upon his citation, and if he fails to appear, he will be appointed to appear next term, and be dealt with as for a contempt of Court.

It was afterwards arranged that the order should be for his appearance on such a day as counsel should move for.

Mr Cockburn opened the case, and stated the facts. Mr More attempted to explain away the facts sworn to by the witnesses, and Mr Cockburn made a few observations in reply.

LORD CHIEF COMMISSIONER.—The question here is not, whether there was a concealed partnership, but there are three distinct Issues to be answered, and you are to draw the conclusion from the whole facts and circumstances proved, and not from the opinion of others, though it was necessary to produce that in proof of the understanding.

A reclaiming petition has been given

SMITH
v.
PULLER.

in, which bears the name of the defender ; and though it would have been competent to shew that it was given in without warrant from him, it is not enough merely to say so. The document affords *prima facie* evidence, and not being contradicted, it becomes a pregnant proof.

You will also consider the evidence of the witnesses, as to the manner in which the father spoke of the company ; and whether the terms he used were those of a member of the company, or of a father speaking of the affairs of his son. You will also consider the evidence of declarations by the defender, as in all courts the declaration of a party is evidence against himself.

The evidence for the defender was evidence of belief, but not of facts and circumstances on which you can form your opinion.

I would rather prefer that you should give an affirmative or negative to each Issue ; but if you choose, you may find generally for the pursuer or defender.

Verdict—" 1st, That it was considered by
" William Puller, and the other partners of
" the said company, that William Puller
" was a partner of said company, and con-

“tinued to be such until near its termina-
 “tion. 2d, That he has acted several times
 “as a partner of said company. 3d, That
 “he has admitted himself to be a partner,
 “but has not held himself out as a partner
 “to any persons who furnished articles for the
 “use of the manufacture.”

SMITH
 v.
 FULLER.

Cockburn for the Pursuer.

J. S. More for the Defender.

(Agents, *J. F. Orr*, w. s. and *J. Stewart*.)

PRESENT,

LORD CHIEF COMMISSIONER.

WALKER v. ARNOT.

1820.
 Nov. 27.

AN action of damages for defamation.

Damages for
 defamation.

DEFENCE.—A denial of having stated
 any thing defamatory.

The case was tried on the 8th November,
 and the Jury found for the pursuer, da-
 mages 1s.

Costs allowed
 where one shil-
 ling damages
 was given for
 defamation.

WALKER

v.

ARNOT.

Jeffrey moved for costs to the pursuer.

Cockburn and *Murray* objected.—The Jury only gave 1s., which does not carry costs. In the case of *Sibbald*, *ante*, p. 122, tried at Dumfries, when 1s. was given, the Court of Session refused expences; and in this Court they were also refused, in a case tried at Glasgow. By the law of Scotland, a person is not entitled to bring an action in the Court of Session for less than L.25; and probably in that Court the expences would have been given the other way. In England, by the statute of Gloucester, and other acts, 1s. in a case of this sort, does not carry costs.

Jeffrey.—This was a case of gross defamation, clearly proved; and being a new case, is well worthy of consideration. There were specialties in the case referred to. It is said the Court of Session would not give expences where the damages are under L.25; but they have given expences without any damages.

LORD CHIEF COMMISSIONER.—I wish to consider this, and shall give the decision on a future day; but will now state how the case strikes me at present.

If damages are really nominal, it is the same as a verdict for the defender; and on that ground costs are not given. But in the

present case, it is impossible for me to divest my mind of the impression, that, if the verdict had been found for the defender, a new trial would have been granted, on the ground of the verdict being contrary to evidence. At the trial, an objection was taken to evidence, and an attempt made to shew that the evidence had been prepared; but I was of opinion, that the agent for the pursuer acted properly, and I received the evidence. The case was clearly proved, and I left it to the Jury as a case fair and fit to be brought; but as it was proved that the defender was a carter, I even more anxiously than usual urged upon the Jury the necessity of being moderate in their damages, and the Jury may have acted under the impression of this direction.

Being ready, if called on, to certify that this was a fit case to be brought, and the defamation being proved, I am at present of opinion, that costs ought to be given; but I wish to have an opportunity of conversing with my brethren.

Two days after, in presence of the other Lords Commissioners, his Lordship stated, There ought to be a statutory regulation of costs; and in that case the rule should be, that costs should follow the certificate of the

WALKER

v.

ARNOT.

WALKER
v.
ARNOT.

Judge who tried the cause. As in this case I am ready to grant such a certificate, we are of opinion, that costs ought to be given.

On a subsequent day, on a motion to approve of the Auditor's report, it was proposed that part of the expence should be struck off, on account of the smallness of the damages.

LORD CHIEF COMMISSIONER.—In this Court the damages are left to the Jury, and they have in this case found damages. The present question does not depend on the amount, but whether it was a fit case for an action. I formerly stated, that it appeared to me that the action was properly brought; and therefore, unless there is any objection to the report by the Auditor, we must approve of it.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1820.
Nov. 27.

SKENE v. MABERLYS.

AN action of damages for a nuisance.

DEFENCE.—A denial that a nuisance existed.

ISSUES.

SEENE
v
MARRLYS


“ Whether, subsequently to the month of
 “ August 1815, the defenders, by bleaching
 “ and other operations carried on in part of
 “ the lands of Rubislaw, held in lease by the
 “ defenders, did pollute and spoil the water
 “ of the burn or rivulet of Rubislaw, so as to
 “ injure the quality of the water in passing
 “ through that estate, (the property of the
 “ pursuer), to the injury and damage of the
 “ pursuer? Or, Whether the said pursuer
 “ did, by himself or his agents, agree to, or
 “ acquiesce in, the use made of the said wa-
 “ ter by the defenders; and did witness, with-
 “ out challenge, the construction of expensive
 “ works by the said defenders, on the faith of
 “ such acquiescence? And to what extent
 “ he did so agree or acquiesce?

“ Damages laid at L.7000.”

This case was tried at Aberdeen, and a ver-
 dict returned for the defender on the first Issue.

1820.
Nov. 29.

A motion had been made for a new trial;
 and this day LORD GILLIES read the report
 of the trial, and stated generally, that the im-
 pression on his mind was, that the pursuer
 had made out his case, and that the verdict

SKENE
v.
MAHERLYS.


was not what he anticipated. That in his charge to the Jury he had said, that, as no damages were proved, the Jury might give small damages, the object being not to get damages, but to ascertain the right.

Jeffrey shewed cause against the rule for a new trial, and stated—The ground upon which this application is made is a very delicate one. The Court will not trench on the province of the Jury, and balance the evidence.

LORD CHIEF COMMISSIONER.—It is of consequence that it should be understood, that the Court never thought of balancing the evidence.

Jeffrey.—There was here a Special Jury and a view. The viewers are witnesses, and ought to overpower all other evidence. The Jury did not do any thing palpably indefensible.—Grant on New Trials, 176; Hankey v. Trotman; 1. Black, Rep. 1. It is admitted that the stream is polluted; but the question is, if this was done to the injury of the pursuer, and without a title. Our notes shew—

LORD CHIEF COMMISSIONER.—The recollection of the Judge may be assisted by

counsel, but *his* recollection and notes must be decisive.

SKENE
v.
MABERLYS.


Jeffrey.—The works have existed for 50 years; and even if we had made a slight addition to them, this is no ground for damages. The Court of Session held so to-day in the case of Dalrymple of New Hailes.

The evidence was contradictory on several points, though I don't think irreconcilable; but the Jury are the proper judges of evidence. At one time the works were defective, and did pollute the water; but that was settled by correspondence at the time; and it is almost admitted, that now we are most careful.

Gordon.—I admit the Court are strict in granting new trials; but if a verdict is in common sense contrary to evidence, a new trial must be granted. The Jury, I admit, were perfectly respectable, and, if they kept within law, we cannot touch the verdict. I agree, in general, as to what has been said on the cases; and if there is cross-swearing, the Judge will not interfere. In this case all our witnesses agreed that the stream was polluted by vegetable matter, and the other party admit it. The farm was let for agricultural purposes.

SKENE
v.
MABERLYS.
1820.
Dec. 11.

LORD CHIEF COMMISSIONER.—This case was tried before Lord Gillies, and a motion is made to set aside the verdict, as contrary to evidence. The Court have thought it right to take time to consider, both from the importance of the case, and with a view to the general principle on which it must be decided. The Court is deeply impressed with its importance; and particularly so, as our decision is final, there being no other judges to whom the case can be carried by appeal, if we should refuse the application; but if we grant the new trial, the effect is merely to subject the case to the review of another Jury. Jurisdiction is given us in this matter by § 16 of the stat. 59. Geo. III. c. 35; and under the 6th section of the statute 55. Geo. III. c. 42, it was competent to apply for a new trial on the same ground. No attempt has been made in this case to call in aid the latter clause of the section, which makes it competent to grant a new trial, when it is essential to the justice of the case; and it is agreed on all hands, that even if we did go on these words, they do not give us an unlimited, but merely a sound judicial discretion on this subject. In this country, trial by Jury being new, there

can be few instances of granting new trials ; and the practice in the Court of Session is too short to have established any rules ; we can therefore only look to the law of England. I have consulted the authorities in that law, without any commentary ; and, on the whole, without getting into any of the technicality of the English law, we are of opinion, that in the exercise of a sound discretion, and applying the principles of right reason to this case, we have power to set aside the verdict, and that it ought to be set aside.

SKENE
v.
MABERLYS.


We do not assume the power to set aside the verdict as contrary to the opinion of the Court, or of the Judge who tried the case. The principle on which we proceed is laid down by the Lord Justice Clerk and Lord Robertson, with much good sense and perspicuity, in a similar application, in the case of Baillie v. Brysson, 12th March 1818, vol. I. p. 341. The inconsistency in the English cases to which these Judges allude, is more apparent than real ; but what depends on discretion must frequently appear inconsistent ; and before Lord Mansfield's time there appears some ground for the charge of inconsistency. His Lordship then stated that he had looked into the original cases, but that

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v.
MABERLYE.



the views of the English Courts on the subject, at the time Lord Mansfield came to the Bench, would sufficiently appear, from the collection of these cases, in the 6th vol. (5th of fol. edit.) of Bacon's Abridgement. The cases from 1756 are most worthy of attention, as at that time there was the ablest Bench that England, or perhaps any other country, ever saw. The principle may be drawn from *Farwell v. Chaffey*, and *Macrow v. Hull*, in 1757. But the most important case is *Bright v. Eynon*, 1. Barrow, 390, where it is laid down that the Court may grant a new trial where there is reasonable ground to doubt whether justice has been done. It is not necessary to trace the principle through all the cases; but there is one opinion rested on, to which I must refer; it is that of Lord Cambden in 1763, (then Chief Justice Pratt) whose memory lives, and will live.

The volume of Bacon in which this case is reported, is certainly not of the same authority with the first three volumes which were revised by Chief Baron Gilbert. Yet even in Lord Cambden's opinion, as there stated, there is not much to object to; and the other Judges, particularly Justice Gould, lay down exactly the doctrine of the cases in the King's

Bench. Besides, from the manner in which the case is reported, it is impossible to discover whether it was a hard action, or whether there were other grounds for the decision ; and in these circumstances it is impossible for the Court to set this up as an authority against all the other cases.

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v.
MABERLYS.



In 1810 the Court of Common Pleas granted a new trial, not as thinking the verdict wrong, but that more light might be thrown on the subject ; and Sir James Mansfield there states, that the Court may grant a new trial on account of the value of the subject, or that the verdict establishes a permanent right.

In the present case we consider it proved, that before 1815, the stream was fit for culinary purposes, and it is proved that it has not been so used since. It is polluted by a variety of substances, and as to some of them there is contrariety of evidence. Where there is contrariety of evidence, the Court will feel disposed not to interfere with the verdict ; but in this case there is no contrariety as to the stream being polluted with vegetable matter, which is a ground for their interference.

An architect stated it as his opinion, that this stream is of use to the feuars only as a

SKENE
v.
MABERLEY.

common sewer; but we cannot take that opinion in opposition to the evidence of a person who proves that he became a feuar on the faith that the stream was to remain pure.

As the new trial is granted on the ground that the evidence of vegetable matter being in the stream remains uncontradicted, perhaps I have said more than enough as to the power of the Court on other grounds to grant a new trial.

The opinion of the Judge who tried the case being against the verdict, is not a sufficient ground for granting a new trial, but is certainly a very strong and important circumstance. We therefore grant the new trial, on payment of costs.

LORD GILLIES.—I shall not add any thing on the principle of law, but may state a few words as to the evidence. It was proved, that, up to 1815, the water of the stream was used for domestic purposes, but that, subsequent to that year, this use of it was abandoned; and so far from being contradicted, this evidence was confirmed by a witness for the defender.

The vegetable matter was proved by all the witnesses; and though the defender per-

haps proved that the means he used were sufficient to prevent the bad effects of the other hurtful ingredients, he did not attempt to prove that he prevented the vegetable matter from getting into the stream; and this source of pollution must of course increase with the extension of the works.

SKENE
v.
MABERLYS.



LORD PITMILLY.—Though at first I felt it to be a most delicate matter to interfere with the verdict of a Jury, yet, after considering this subject with the greatest care, and going through all the cases referred to, I came most completely to concur in the opinion delivered.

Skene and *Jeffrey* moved that two additional Issues should be sent to trial, viz. 1st, Whether the stream was polluted, and to what extent, prior to 1815? 2d, Whether it remained so at the date of the next trial; and stated, that these ought to have been tried though the verdict had not been set aside. The Court of Session will be misled, unless there is a return on these questions; and as it would have been competent to apply in that Court for additional Issues, it must also be competent here.

Additional Issues not granted after a first trial.

SEENE
v.
MAKERLYE.



Gordon.—The Issues were fully discussed at the time when they were prepared ; and, if any fact of importance comes out in evidence, it may be indorsed on the Issues ; but I object to a new case being sent to trial. This is a new and irregular proceeding, and there is a final judgment ordering the Issues as they stand to be the Issues to try the cause.

The Second Division of the Court of Session refused a similar application in Lord Fife's case.

Jeffrey.—In Lord Fife's case the motion was to alter the Issues ; and the application for additional Issues was not made till after the second trial, and they were refused on the ground that the trustees had barred themselves. Except on the ground of convenience, the Issues now proposed might be tried by a different Jury.

LORD CHIEF COMMISSIONER.—This case was sent here to prepare and settle the Issues ; but being a question of heritable right, it goes back to the Court of Session for final judgment. If the question were, whether, on the case going back to the Court of Session, the nuisance were to be put down, that Court might be of opinion, that the facts found are not sufficient to satisfy their minds ; but our difficulty

is, that Mr Jeffrey has not shewn us the authority by which we are to do what he now asks. I do not wish to lay down an absolute rule, that in no case this could be done; but I have no difficulty in saying, that after a case has been sent down to trial on one set of Issues, the Court will be very cautious indeed in the exercise of the power to alter them. It is quite true that the Courts of Law in England do not try additional matter in the manner proposed, but the practice is different in the Courts of Equity; for in a Court of Equity additional matter may be sent down to trial, to satisfy the conscience of the Court. But this case is quite clear of such a question; it is a question of declarator and damages, and the Issues were prepared with great attention and much deliberation. The first part of the Issue formerly tried, is on the declaratory part of the case; and the Court and Jury could not come to a conclusion upon that Issue, without a proof of the state of the rivulet previous to 1815; and in this way the first Issue proposed to be added, is embraced by the present Issue.

On the proposed Issue to try the state of the water at the date of the next trial, it is sufficient to say, that in my opinion, that

SKENE
v.
MABERLYE.


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would be sending a new cause to trial. The Issue must be in the action brought, and must therefore be, Whether from 1815 to the date of the summons, the stream had been polluted. It would be a most important alteration to send the Issue proposed; and if it is not to be tried at the same time, and by the same Jury, it would do no good. If the question is to be tried as to the removal of the nuisance, it must be in another action in the Court of Session. Before we could be brought to comply with a request like the present, we must be satisfied, not only that it is proper, but that it is the only remedy the party has.

LORD GILLIES expressed his concurrence in the decision, and said, that if the motion had been granted, it ought to have been on payment of costs.

CAMPBELL
v.
ALLAN.

PRESENT,
LORD CHIEF COMMISSIONER.

CAMPBELL v. ALLAN.

1820.
Dec. 14.

AN action of damages for defamation, uttered on two occasions.

Damages
claimed for de-
famation.

DEFENCE.—The defender may have made use of improper expressions, when heated with wine, but he wrote an apology.

Moncreiff, for the defender, stated, that the pursuer had been a candidate for a seat in Parliament, and that the supporters of one candidate frequently applied as strong terms to the opposite candidate and his friends: That the defamation was not proved, as the pursuer only called a single witness, and did not call four others who were present. The second instance is disproved.

LORD CHIEF COMMISSIONER.—This point was determined in the case of *Landles v. Gray*, 18th July 1816, Vol. I, p. 79; and I

CAMPBELL
v.
ALLAN.

am of opinion, that there is here a case to go to the Jury.

You, gentlemen, have heard the evidence and seen the witnesses, and your good sense will, in general, do as much as the experience of a Judge, in discovering where the truth lies. Some of the words in the Issue have been sworn to, and others not. If you think the words proved, you will have to consider the damages, which is entirely with you.

Verdict for the defender.

Clerk, Jeffrey, and Cockburn, for the Pursuer.

Moncreiff, J. A. Murray, and Wilson, jun. for Defender.

(Agents, W. Dallas, w.s. and Gibson, Christie, and Wardlaw, w.s.)

PRESENT,

LORD CHIEF COMMISSIONER.

1820.
Dec. 14.

ROBINSON v. EDINBURGH & LEITH SHIPPING COMPANY.

Goods found to have been delivered to a servant of the defender.

AN action for the value of certain goods contained in boxes shipped on board a vessel belonging to the defenders.

DEFENCE.—The boxes were shipped as empty boxes.

CAMPBELL

v.

ALLAN.

ISSUES.

“ Whether, on or about the 13th March
“ 1818, the pursuer did deliver to the wag-
“ goner employed by the defenders to receive
“ goods, two boxes or packages containing the
“ goods mentioned in the schedule hereunto
“ annexed, addressed to John Robinson, Co-
“ ventry, to be shipped and sent by the de-
“ fenders from Leith to London, and to be
“ safely landed and delivered at Downe’s
“ Wharf in London; and whether the said
“ boxes or packages, with the goods therein
“ contained, were landed and delivered in
“ safety as aforesaid, and in the order and
“ condition in which they were delivered to
“ the waggoner as aforesaid, to be from thence
“ transmitted to Coventry?—Or,

“ Whether the said boxes or packages
“ were delivered to the waggoner of the de-
“ fenders as aforesaid, as empty boxes or
“ packages, to be shipped at Leith, and land-
“ ed or delivered in London as aforesaid, in
“ order to be sent back to Coventry; and
“ whether the said boxes or packages, as last

ROBINSON
v.
EDINBURGH &
LEITH SHIP-
PING Co.

An entry in a
merchant's
books, good as
a memoran-
dum to refresh
the memory of
a witness.

"aforesaid, were landed or delivered in Lon-
don, as aforesaid, in good condition?"

The first witness was called on to produce a book, containing an entry of the goods.

LORD CHIEF COMMISSIONER.—This is very good as a memorandum to refresh the memory of the witness, provided it was made at the time; but I doubt if the book is evidence.

Cockburn.—The second Issue may be laid out of view; and on the first, though we might perhaps raise suspicions that this is an attempt to recover the price of goods not sent, our servants having received the boxes as empty; yet, as we do not mean to lead evidence on that point, you must find for the pursuer. You are not, however, to find whether we are liable for the goods; but the dry fact, whether the packages were delivered to us properly directed.

Jeffrey.—An honest merchant brings an action to recover goods he has lost, and is met by a charge of fraud. The defender must prove that the boxes were lost in consequence of the want of a proper address. We proved that the two packages were properly directed


at the time they were delivered to the waggoner; and our complaint is, that the address was taken off, and the boxes treated as if they were empty.

ROBINSON
v.
EDINBURGH &
LEITH SHIP-
PING Co.


LORD CHIEF COMMISSIONER.—You are relieved from consideration of the second Issue, which did imply some charge of fraud; but as this is given up, we must consider the case as a simple question between two respectable merchants.

During the course of the trial, I had some doubts whether this Issue filled up the whole case; but I am now satisfied that it does; and that, after hearing all the evidence, we could not make the Issue different; and, therefore, a finding for the pursuer or defender will be sufficient. It is proved that *two packages* were delivered; and, therefore, the question is, whether they were properly directed, and not whether the *12 boxes* were so. In England, this case would have been rested on the testimony of the first witness alone; but here it is necessary to have circumstances in support of his testimony; and the evidence of the waggoner as to the state in which he received them, affords such support. If you credit the witness, and I see

ROBINSON
v.
EDINBURGH &
LEITH SHIP-
PING Co.



no ground to doubt his testimony, you will hold that the packages were delivered to the waggoner.

The next question is, whether they were delivered in London in the same state. It is proved by the waggoner that he altered the condition of the packages before they reached Leith; and if you are satisfied that they were delivered to him properly addressed, the defenders are liable for any change made upon them by their servant.

The only point for us to consider is, whether they were delivered in London in the same state as when delivered to the waggoner in Edinburgh; and the evidence is, that they were treated as twelve empty boxes, and not as two packages. If I am right in this view of the case, then the pursuer is entitled to a verdict; but it is for you deliberately to consider the evidence.

Verdict for the pursuer on both Issues.

Jeffrey and J. S. More, for the Pursuer.

Cockburn and Boswell, for the Defender.

(Agents, Duncan and Lang, and John Young.)

PRESENT,
LORD CHIEF COMMISSIONER.

SIR JAMES
FERGUSON
v.
WORDSWORTH.

SIR JAMES FERGUSON v. WORDSWORTH.

1820.
December 18.

AN action by the defender, for the price of a horse.

Found that a horse was not unsound.

DEFENCE.—The horse was unsound, and returned.

ISSUES.

“ Whether a grey horse, admitted to
“ have been sold and delivered by the de-
“ fender to the pursuer at Edinburgh, on the
“ 2d day of June 1819, warranted as a sound
“ horse, was, at the time of his being sold,
“ unsound, by having a disease called the
“ spavin, or by having another disease called
“ the thoroughpins?

“ Whether the said horse, sold and deli-
“ vered as aforesaid, was at the time of his
“ being sold an unsound horse?

SIR JAMES
FERGUSON
v.
WORDSWORTH

“ Whether, upon the 3d day of June
“ 1819, the defender did agree to receive
“ back the horse sold as aforesaid, on condi-
“ tion of the pursuer paying the King’s duty,
“ whether the said horse was sound, or un-
“ sound ?”

Walker, in opening the case, and *Cockburn*, in reply, stated—There may be difference of opinion as to the cause of the unsoundness ; but the horse is proved to be unsound. This is a question of medical science, where opinion is to be taken as fact ; and we have proved the case.

Jeffrey, for the defender.—The eye with which a horse is examined by a friend or foe, is very different ; and there is frequently rash swearing. Here part of the evidence does not deserve so mild an epithet.

LORD CHIEF COMMISSIONER.—It is said you ought to weigh, and not to number the witnesses, and in this I agree ; but although I think a few might have been spared, I am not prepared to say, that in this case numbers have not some weight.

There are here three classes of evidence ; and though there is contrariety of evidence, I cannot say that it is not honest. There is

the evidence of those who were acquainted with the history of the horse—of those who examined it after the sale—and of those who examined it after it was dead.

SIR JAMES
FERGUSON
v.
WORDSWORTH.

Had the case depended on the first Issue, I must probably have entered into a detail of the evidence as to the different kinds of spavin; but the case is much simplified, as it appears to me to depend on the second Issue. I do not think the third Issue proved; and therefore the question is, whether the horse was unsound. The witnesses who considered the horse unsound, stated that there was the appearance of blistering; and this is an important circumstance, as it shews that these witnesses examined the horse under the idea that he had been blistered. Now, we have it proved, that during his whole life he never was blistered; so that finding they rest part of their evidence upon a mistake, that appears to me to explain the contrariety of evidence.

Verdict for the defender on all the Issues.

Cockburn and Walker, for the Pursuer.

Clerk, Jeffrey, and Brownlee, for the Defender.

(Agents, Walker, Richardson, and Melvill, and John Jones.)

MITCHELL
v.
MAGISTRATES
LINLITHGOW.

PRESENT,

LORD CHIEF COMMISSIONER,

1820,
Dec. 20.

MITCHELL v. MAGISTRATES LINLITHGOW.

Found that it has not been the general practice to levy custom upon horses, &c. crossing a part of the river Avon.

AN action to compel payment of custom to the town of Linlithgow, by persons passing at or near the mouth of the river Avon.


DEFENCE.—The Magistrates have not for 40 years collected custom at the place where the defenders cross the river. The rate demanded is beyond the grant.

ISSUES.

“ Whether, it being admitted that the
“ defenders have levied custom at the bridge
“ of Linlithgow on horses, cattle, carts, and
“ all other carriages conveying merchandise,
“ and at Torphichen Mill Ford, or Bridge,
“ and at the West Bridge, on cattle going to
“ and coming from Falkirk Tryst, the de-
“ fenders have not been in the general prac-

“ tice, for forty years and upwards, prior to
 “ the 26th day of January 1813, of levying
 “ custom upon horses, cattle, carts, and all
 “ other carriages conveying merchandise, pass-
 “ ing the river Avon from the West Bridge
 “ to the mouth of the said river ?

MITCHELL
 v.
 MAGISTRATES
 LINLITHGOW.



“ Whether the defenders have not been in
 “ the general practice, for forty years and
 “ upwards, prior to the 26th day of January
 “ 1813, of levying custom at the ford of Jink-
 “ about, on the said river Avon ?

“ Whether the said defenders have not
 “ been in the general practice of levying cus-
 “ tom for forty years and upwards, previous
 “ to the 26th day of January 1813, from the
 “ tenants and others residing upon the estate
 “ of Kinneil, the property of the Duke of
 “ Hamilton, passing the said river Avon at
 “ the ford of Jinkabout ?

This case was advocated from the Sheriff
 of Linlithgow, who had found the defenders
 liable.

A witness called for the pursuers, stated
 that he farmed about 60 acres of ground be-
 longing to himself, in the neighbourhood of
 Torphichen Mills.

On an Issue as
 to the practice
 of collecting
 custom by the
 Magistrates of
 a burgh, a pro-
 prietor, resid-

ing on his property in the neighbourhood of the burgh, a com-
 petent witness.

MITCHELL
v.
MAGISTRATES
LINLITHGOW.



Moncreiff objected.—He has an interest.

Jeffrey.—If this was an Issue confined to the neighbourhood, he might be an objectionable witness; but this Issue is general, and those in the neighbourhood are the best witnesses.

Moncreiff.—It is said the objection applies to all witnesses; but that is not the case, as the interest of a stranger is so remote as to vanish. Here the interest is manifest, and he is in the same situation as a corporator. Peak, 156; 1. Phillips, 65. (5th edit.).

LORD CHIEF COMMISSIONER.—I have attended to the whole of this argument, as every thing is important on such a subject, and if it is ruled in one way, it strikes at the root of the pursuer's case. In every question of this sort we must attend to what goes to the admissibility, and what to the credit of the witness.

This is a case where there is no individual who may not be said to be interested; and in the case of the individual now offered, I do not think the situation of his property such as to render him inadmissible. When he has no interest as a party—when the verdict can-

not be used by him—and when the objection would apply to all the world, I cannot lay it down that it is an objection to any one of the world, though I do not at present recollect any case precisely in point.

Mitchell
v.
Magistrates
Linlithgow.

This is not a question whether this person is excluded *virtute tenuri*, but it is a claim by the Magistrates of Linlithgow to exact it from all the world. The objection to the tenants of Kinneil would be quite different; and even in the case of this witness, his evidence is subject to observations by counsel.


A tenant on the estate of Kinneil was afterwards called to prove the two first Issues.

An objection was taken, that if these were proved, the third was of no consequence.

Circumstances in which a witness, incompetent to prove one of three Issues, was admitted to prove the other two.

LORD CHIEF COMMISSIONER.—I wish to know if this advocacy contains the whole matter in dispute. My difficulty is from the matter being brought here on a special Issue. If this case were tried on a general Issue, and if one of the questions raised involved the right of the Duke of Hamilton, there is nothing clearer than that this person would be interested. If this third Issue was

MITCHELL
v.
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LINLITHGOW.



contained in the summons, and was made separate merely for greater perspicuity, then I cannot lay down a different rule for the different Issues; but if this was added by the parties in the Jury Court, then it may be treated as a separate cause, and the objection will not apply to the evidence on the other Issues.

Mr Jeffrey observed, that it was not in the summons or advocacy, which Mr Cockburn said strengthened the objection.

LORD CHIEF COMMISSIONER.—The argument by Mr Cockburn applies to what is gone by, but does not bear on this question. I still think I was right in the decision on that point, and if I am wrong, the remedy is by Bill of Exceptions. Suppose any question as to the toll on Leith Walk, would all the inhabitants of Edinburgh be incompetent witnesses? My only difficulty on the present objection, is from the uncertainty whether this question formed part of the original cause, and was separated merely for the purpose of greater precision. If so, then, as this person could not have been a witness on the whole, so he could not have been as to a

part ; but as this appears to me not to have been a part of the original cause, I think he is admissible.

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The witness having stated that Brown was at one time tenant of the customs of Linlithgow, and that he sent a man to watch at Jinkabout, to know how much he lost,

Cockburn.—The person is alive, and ought to be called.

LORD CHIEF COMMISSIONER.—The witness is speaking as to a statement by another person, and your objection is that it is hearsay. But surely what the customer says is evidence, whether he is dead or alive.

An objection was taken to the question, What does the tenant get by the custom table ?

LORD CHIEF COMMISSIONER.—You may go through the different articles in the table, and ask as to each, but you cannot put this question as to what he gets by his lease. The table contains the different articles, and if you wish to shew the practice, you must do it by facts, and not by opinions. But it does seem to me that this is unnecessary, as the

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instrument carries the right, unless the contrary is proved.

Jardine, for the pursuer.—The Magistrates have an old grant of custom, according to use and wont; and they now claim a right to collect it at every point; but we shall confine our proof to five points at which they did not collect. The question here is as to the general practice, and not as to a few instances in which custom may have been exacted.

Moncreiff, for the defender.—A great deal of the pursuer's evidence does not apply to the question to be tried. It is a mistake to say this is a grant of the customs in use, to be collected before 1695. The grant is absolute, and use and wont merely applies to the rate. This is not a mere gratuitous grant, but for supporting the bridge of Linlithgow.


The Magistrates having an absolute grant, their collecting at some points keeps up their right as to all; and the proof on the other side being confined to a few individuals crossing at a few points, does not entitle the pursuer to a general verdict.

Jeffrey.—All the witnesses for the defenders confirm what was stated by ours. The question here is not, if at any time duty was

collected, but if it was the general practice not to collect.

We are bound to prove that no toll was levied; but our evidence, though negative, in fact proves positively. From what is proved, we are entitled to a general verdict.

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LORD CHIEF COMMISSIONER.—In this case, the question is so clear, that it is scarcely possible to elucidate it.

The first Issue contains the point to be tried; and the Court of Session send it here to have the question settled, Whether, &c. The question is put in a negative form; and it was truly stated that the pursuers are bound to prove; and that you cannot take negative evidence against positive. When a party is to establish a proposition, the proof is positive; and even where he is to establish a negative, that is done by a positive proof of facts. If it is to be proved that no toll is levied, the way to do this is by proving persons passing without paying.

The question here is as to a general practice; and it appears to me that the Issues are established beyond the possibility of doubt. All the witnesses for the pursuers prove their having passed without paying;

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and, on the other side, though one witness speaks of something having been collected at one point, the others appear to me to confirm the testimony on the other side.

They also prove, that when an attempt was made, it was resisted, and not enforced, which goes far to prove that there is no general practice to collect.

If you agree with me in the view of the evidence, you may find generally on the first Issue.

As to the other Issues, it may be thought that it is unnecessary to find on them ; but it appears to me that it would be more satisfactory to the Court to have a finding on each.

Verdict—" That the defenders have not
" been in the general practice, for forty years
" and upwards, of levying custom upon
" horses, &c. from the West Bridge to the
" mouth of the river Avon, or at the ford of
" Jinkabout : That they have not been in
" the general practice of levying custom from
" the tenants and others residing upon the
" estate of Kinneil, passing the ford of Jink-
" about."

Jeffrey and Jardine, for the Pursuer.

Moncreiff and Cockburn, for the Defenders.

(Agents, Ro. Rutherford, w. s. and A. Watson, w. s.)

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PRESENT,

THE THREE LORDS COMMISSIONERS.

HARPER v. ROBINSONS & FORBES.

1821.
Jan. 8.

DAMAGES for defamation, and combining to cause the pursuer to be apprehended, and tried for reset of theft.

Damages for
defamation,
and causing the
pursuer to be
tried for reset
of theft.

DEFENCE.—Iron had been stolen from the Messrs Robinsons, of which they gave notice to the local magistrate, Mr Forbes, who acted in the discharge of a public and official duty.

ISSUES.

In this case, the Issues were, Whether the defender, Forbes, combined with the Robinsons to defame the pursuer, by presenting a petition, accusing him of reset of theft?—

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FORBES.

Whether Forbes partially. and irregularly took a precognition, and transmitted it to the Lord Advocate?—Whether Robinsons combined with Forbes in presenting the petition, and transmitting the precognition?—Whether Robinsons, without reasonable cause, did procure the petition to be presented and transmitted, and urged the same to trial.

A witness having stated that he was not sure when a conversation took place, but he thought it was after the trial,

LORD CHIEF COMMISSIONER.—As it is stated that the time will be proved, we shall give the counsel credit for this; but if the time is not afterwards proved to have been before the trial, this evidence goes for nothing; and, of course, this is lost time. It would surely be better to fix the date first.

Mr Moncreiff maintained, that he was entitled to put particular questions to another witness, and to ask, whether Mr Forbes, the defender, had said that the pursuer had got into a scrape.

LORD CHIEF COMMISSIONER.—This is a perfectly fair witness, but you are not entitled in this manner to put words into his

mouth. You may certainly put particular questions, but are not entitled to put leading ones.

The Lord Justice Clerk was called.

Jeffrey.—I have not the least objection to his Lordship proving any thing that took place in open Court; but I give the other party warning, that I shall object to any question as to the impression on his Lordship's mind as to the guilt or innocence of the pursuer.

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Quere, Whether it is competent to call a Judge of a Supreme Court to prove what takes place before him in the course of justice.

LORD CHIEF COMMISSIONER.—Before his Lordship is sworn, it is perhaps right that I should state what has occurred to the Court on this subject.

There are many points which have suggested themselves; some of them, perhaps, it is more for his Lordship than this Court to state; but there are also some affecting the administration of justice. It might be productive of the most injurious consequences, if a party were to think himself entitled to call a Judge to prove what takes place before him in the course of justice. If a Judge is called as a witness, his evidence must be treated as that of any other witness; and in this first case of the kind, I wish to bring the effect of this particularly into view. What, for

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instance, might the consequence be to the administration of justice, if a Judge, speaking from his notes, is to be contradicted by other witnesses as to what passed? I do not mean to say, that in a case of necessity a Judge may not be called, or that it is not fit, in certain cases, that a Judge should consent to be examined. But in cases of indictment for perjury in England, the proof is never by the Judge who tried the case, but by some person who has taken down the evidence for the purpose of proving it; and this is founded on the great principles of public policy, and the injury to justice in examining the Judge.

If a party brings an action of damages, he must be in a situation to prove it; and I consider it in the option of the Judge to answer or not. We shall not pronounce any order on the subject, but must leave it to his Lordship's discretion.

The examination must either be to facts taking place at the trial, or to facts falling under his Lordship's observation. We cannot take his opinion here, however great the weight of it may be in his own Court. It is only in matters of science that opinion is evidence; and of late, it has been allowed in

matters of mercantile practice. The opinion upon which the Jury must act, is that of the Judge trying the cause, drawn from the evidence that may be laid before the Court; and any opinion proved in the manner suggested, would be an encroachment on the province of the Jury. This we have thought right to state as our opinion, without having heard the question argued.

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Moncreiff—Suggested, that the witness might be sworn; and if any question was improper, an objection might be taken to it: That the object was to prove the facts, and that there was an undoubted right to cite his Lordship.

LORD CHIEF COMMISSIONER.—You have called a Supreme Judge to prove facts taking place in a Court where there were a number of persons present. The dignity and success of the administration of justice require, in my opinion, that the Court should interfere, and say, this is a witness who ought not to be sworn. But this is not the only objection, for this is not the method of proving the trial. We shall, however, give you credit for afterwards producing the proper evidence; and at present

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we will allow you to put such questions as may be competent.

LORD GILLIES.—I understand the questions you mean to put, are unconnected with his judicial character.


Jeffrey.—The objection taken by the Court it is not for the bar to interfere with ; but so far as any waiver on our part could obviate the objection, we are most willing to give it; as we are anxious to have the evidence from the highest quarter—but this can only be as to those who are parties in this cause, as the other witnesses are here to prove the truth of what they then stated.

LORD CHIEF COMMISSIONER.—Seeing the name of this witness in the list, led us to consider this question ; and though the defender may wish this evidence, are we to risk the general administration of justice, by allowing a Supreme Judge to be examined in this way ? I still think that necessity is the only ground upon which it can be allowed. As to his Lordship's notes, they cannot be received as evidence, but are merely notes to aid his memory.

Moncreiff.—This is a claim of damages for a malicious prosecution ; and we shall put

in the record of the trial and acquittal; but we also have to prove, that the evidence was different from the information given. The notes of the Judge, taken under his oath of office, and from which the facts are to be submitted to the Jury, are the best evidence of what the witnesses said. In trials for perjury, the Judges are competent witnesses; and as a party cannot come prepared to record the malice which shews itself in the course of a trial, this is a case of necessity, which renders it competent to call the Judge.

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Reference was made to the case of Somerville, where the Macers, who are Judges in a service, were examined; and a trial in 1809 was mentioned, in which Lords Meadowbank and Hermand were examined.

Jeffrey.—I agree entirely with Mr Moncreiff; and would suggest, that as both parties consent, the Court might allow the questions to be put, and the learned Judge might decline answering.

LORD PITMILLY.—What was the nature of the inquiry that was made at Lords Hermand and Meadowbank?

Jeffrey.—They were examined whether there was such a contradiction as could not

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be explained by the stupidity of the witness. Sir Hay Campbell was called once to prove what took place while he was sitting as President.

LORD CHIEF COMMISSIONER.—That is as to a matter falling under his observation; and I have been present when Judges were examined as to a riot in Court. As it appears that Judges have been called in the Court of Justiciary, and as both parties agree to the examination, I think it better that it should be left to his Lordship to say whether he chooses to be examined; but I cannot let it pass, without noticing the great inconvenience that may result from this practice; and unless the bar agree to discontinue it, I rather think some remedy should be applied for.*

The Lord Justice Clerk was then sworn, and stated, that he wished to read his notes, as more satisfactory than any answers he could give; and stated, that they were as correct as he could make them; and he had paid

* See *post*, p. 404.

particular attention to this case, from the statement made by the opening counsel.

After reading Robinson's evidence, his Lordship was requested to read that of the other witnesses.

Jeffrey—Objects.

LORD CHIEF COMMISSIONER.—You need not argue this.

Moncreiff and Murray.—We are entitled to this, on the authority of the case quoted. The Judges were examined as to the whole evidence; and we cannot understand a part without the whole. If the whole had been taken down, or recorded, at the time, we would have been entitled to produce the whole; and the notes must be more correct than the recollection of the witnesses as to what they stated.

LORD CHIEF COMMISSIONER.—This is an action of damages for a malicious prosecution; and the first thing is, to prove the acquittal; but the facts and circumstances which led to the acquittal, are no part of this case. The prosecution must be proved to have been malicious, and without probable cause. The pursuer wishes to make out the malice, and want of probable cause, by comparing the

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In an action against a magistrate for misrepresenting to the Lord Advocate the declarations emitted by witnesses; incompetent in the first instance to call other witnesses to prove the evidence given at the trial.

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evidence of Forbes and Robinson with their declarations. By consent of parties, and the Lord Justice Clerk not objecting, we have got over the objection to his examination; and his Lordship having stated the evidence of the parties, it is now proposed to have the evidence of another witness proved in the same way; but why may the witness not be called to give his evidence, as there is no allegation that his evidence differed from his declaration? It is said, if the evidence had been taken in short hand, that the notes might have been produced; but I deny that they could. It is then said, that if it had been taken down in the record, according to the old practice in the Court of Justiciary, that the record might have been produced. It may be bold in me to give an opinion upon this; but at present I think the competency of producing it, at least doubtful; and that the only way of getting the evidence, is by calling the witness. Should he at present contradict the testimony he formerly gave, it may be more difficult to say how you are to prove what he formerly swore; but it is unnecessary to discuss that now.

Incompetent
to prove the
opinion of a Judge as to the propriety of abandoning a prosecution.

The Lord Justice Clerk having stated,

as to the propriety of abandoning a prosecution.

that the trial was abandoned by the public prosecutor, was then asked whether the Court concurred in the propriety of the abandonment? And whether at the trial, or in the address to the Sheriffs, the Court made any observations on the conduct of Mr Forbes? An objection was taken to both these questions.

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LORD CHIEF COMMISSIONER.—I have already stated so fully our opinion on the subject, that it is sufficient to say we think the questions incompetent.

It was proposed that the declaration emitted by a witness, when examined in the precognition before the trial at Aberdeen, should be read to him.

Circumstances in which it was found competent to read part of a precognition, to prove that a witness was imposed upon in signing it.

Cockburn objects.—They wish to infer, that the precognition was not correctly taken, because it differs from what the witness now states. Suppose the witness now states that every word he then said was false, the declaration would be a sufficient defence against this action. Their proof ought to be, that the declaration was not fairly taken down at the time.

LORD CHIEF COMMISSIONER.—It is quite clear as you state it; but I suppose they mean

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to go farther. They at first called the witness, to prove the facts, different from the statement in the declaration; but I now understand they mean to prove, that an important statement, made by the witness, was not taken down. It is incompetent to read the declaration, to shew that the facts are different from what are there stated; but it is competent to shew that he was imposed upon in signing it.

In damages for a malicious prosecution, incompetent to prove the opinion expressed by the Judge at the trial, of the conduct of the prosecutor.

A barrister who was present at the trial at Aberdeen, but was not retained in the case, was asked whether the prosecution appeared to him malicious?

LORD CHIEF COMMISSIONER.—That is incompetent, as it is the conclusion which the Jury must draw from the facts.

He was then asked, what the Lord Justice Clerk stated of the conduct of Mr Forbes, relative to that trial? The Court sustained an objection to this evidence, and also to the testimony of two Jurymen, who were tendered to prove the same point; and also to prove the evidence given by a witness.

Incompetent to prove the impression on

A witness having proved statements made the mind of a witness, by statements made by a defender.

by Mr Forbes, was asked, whether the impression made on his mind, by the expressions of Mr Forbes, were to the prejudice of Harper the pursuer.

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LORD CHIEF COMMISSIONER.—This I admit is different from what passed at the trial, but still I think it incompetent. You have already got facts, from which it is to be inferred, that Forbes stated, that he thought the pursuer would meet with the punishment mentioned; but I do not think you can ask the witness the impression made on his mind.

A witness was called, to prove statements made by Forbes, after the trial.

Cockburn.—I doubt if this is competent, especially if they were made after this action was brought.

Competent to prove statements made by a defender, after an action brought for a malicious prosecution.

LORD CHIEF COMMISSIONER.—It appears to me competent, as shewing the temper of his mind; and the action having been brought, I rather think should have put him on his guard to be cautious.

An objection was taken to the counsel for the defender calling back a witness who had left the box.

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LORD CHIEF COMMISSIONER.—I will never be a party to an attempt, either to admit or cut out a reply; and it is a thing which ought never to appear above ground, even at the bar. From the circumstances in which this witness was allowed to withdraw, I think he may be recalled.

Murray opened the case for the pursuer.

Jeffrey, for Robinson, maintained, that malice was necessary, and that none was proved. The defenders merely gave information. The Lord Advocate, thinking the precognition sufficient to warrant a trial, proves that there was probable cause for giving the information.

Cockburn, for Forbes.—The pursuer was suspected of reset of theft, but was acquitted; and two years after, he hopes to make money of it, by accusing Forbes of a malicious conspiracy.

In the proceedings against the pursuer, the defender acted ministerially; and being a Magistrate, the malice must be proved. In proof of it, an allegation is made, that he dictated a petition to himself; and that the declarations were falsified. It is not unusual in practice for a Magistrate to dictate a petition. The declarations were freely and voluntarily

signed ; and is it to be borne, that a witness shall come, at the distance of five years, and state that some part of his declaration was not taken down ?


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LORD CHIEF COMMISSIONER.—I shall not detain you with many observations ; but this is one of those actions which the law views with anxiety, as it is of importance that an individual should be compensated, if he has suffered wrong, and that a public officer should be protected, if he had probable grounds for acting in the manner he did. In this country, prosecutions for crimes are in the hands of public officers, from the Procurator Fiscal, up to the Lord Advocate ; so that it is very improbable that any thing should be done maliciously.

To support this action, two things are necessary :—1st, Malice against the individual, which does not require to be proved directly, but may be inferred from facts and circumstances.—2d, Want of probable cause for the prosecution, which is the want of a well grounded suspicion that the crime has been committed by the person brought to trial.

The history of this case seems to be, that iron is taken from Messrs Robinson, and the same, or similar iron, is found in Harper's

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possession. He is accused and brought to trial in September 1815; and it is proved by the verdict (and a little more irregularly by the Judge), that he was acquitted.

I have little doubt as to your finding upon the 1st and 3d Issues, as I consider little made out on them; but I wish you to attend to the first, as it explains the other. The pursuer made out the last part of the second Issue, and indeed he could not move a step without this; but the first branch is the gist of the action. The defenders have separated their defence, as they were entitled to do; and unless you think the conspiracy proved, you will consider them separate.

As to Robinson, it does not appear to me that a word of the evidence applied to him; and if, in his petition, he does not accuse the pursuer of reset of theft, or if he had probable cause for the accusation, this will be a defence. You are to take Harper as a pure and spotless character; but if there was probable cause for suspecting him, he is not entitled to recover; and you are to say whether he was not in a suspicious situation.

But the principal matter of consideration is as to Forbes; and here it is important to consider, that public officers should not be

severely dealt with; but the evidence ought to be weighed in golden scales. If, however, you think the case made out, it is proper that damages should be given, as there cannot be a greater dereliction of duty, than to use a public situation for the purpose of oppression.

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ROBINSONS &
FORBES.

I should do wrong if I stated malice to be proved by a slight conversation, or by proof of burgh jealousy. The case, therefore, rests on the question, whether the precognition was fairly and accurately made up.

It is said Robinson's declaration must have been improperly stated; but it appears to me, that this is the declaration of a person anxious to tell the truth; and on the trial he will not prove the iron, as he did not seal the bag. Now, a person who meant to convict the pursuer, would have gone all lengths, and proved the goods. This applies also to the case of Forbes; for if they formed a plan, it would not be to accuse, but to convict.

What was stated as to Forbes, appears to me the only part of the case which will cause you anxiety; and here you must not rashly hold a public officer, who has a great duty to perform, to have abused his situation in this manner.

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A part of the declaration made by one witness, was not taken down; and the declaration of another was not read over. You will judge whether the substance is not taken down, and if you are of opinion that it is, the foundation of the action is not proved; but if you think this part of the declaration was withheld, or that that of the other witness was not read over, for the purpose of misleading the Lord Advocate, the case is made out.

If the facts omitted are so important as to indicate a malicious mind, you will find damages; but if there is no malice, or if there was probable cause, you will find for the defenders.

Verdict.—"Find for the defenders on the
" 1st Issue, on the 2d Issue for the pursuer,
" and on the 3d and 4th Issues for the de-
" fenders; and on the 2d Issue they assess
" the damages at L.300, against George For-
" bes, one of the defenders."

Moncreiff and J. A. Murray for the Pursuer.

Jeffrey and H. H. Drummond, for Robinsons.

Cockburn and J. Maconochie for Forbes.

(Agents, *G. Simson, S.S.C. and Inglis and Robinson, w. s.*)

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v.
ROBINSONS &
FORBES.

1821.
Jan. 19.

New Trial refused, the application being made on the ground of an inaccuracy in the Issues; and the verdict being contrary to evidence.


Cockburn moved for a new trial, and stated,—The verdict is against evidence. No damages were proved. There was no proof of any such petition as is mentioned in the 2d Issue. There was no proof of malice or of fraud in taking the declarations.

LORD CHIEF COMMISSIONER.—We principally grant the rule on the point as to the petition, but the whole will be open.

After reading the report of the evidence, Jan. 24. the LORD CHIEF COMMISSIONER stated—That his direction to the Jury had been: That on the 1st, 3d, and 4th Issues, there was no ground for finding damages, as the petition produced did not accuse the pursuer of reset of theft: That on the 2d Issue, it was a question for the Jury, whether the not reading the declaration arose from improper motives, or from carelessness: That the probability of no improper motive in a public officer, ought to weigh much with a Jury; but that the question of malice was in their hands.

Murray.—Malice can only be inferred from the impression of the whole evidence.

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ROBINSONS &
FORBES.



A new trial is asked on the ground of informality, and that the verdict is contrary to evidence.

The petition is improperly described in the Issue. It differs from the summons or condescendence.

LORD CHIEF COMMISSIONER.—The Issues are prepared on communings with the parties, as well as from the condescendence; and this must have been put in by the parties, as we could never have substituted this description of it.

Murray.—We are not bound by the petition, as it is sufficient if the accusation can be made out from the precognition. An error in form is no sufficient ground for setting aside a verdict.

The other ground is, that the verdict was contrary to the evidence, which is a most delicate ground. The question here is, whether there was any evidence. This was left by the Judge to the Jury. The trial was fair; and the damages moderate.

Cockburn.—Here the verdict was on *no* evidence; and a verdict contrary to justice is worse than any number of trials, though a new trial is an evil. As to the first ground, we cannot abandon it. The *said* petition

must be the petition in the first Issue. The plain and strict meaning of the Issue must be taken.

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FORBES.

LORD CHIEF COMMISSIONER.—Before you leave this point, it is proper to state, that we consider there are three clauses in this Issue, any one of which is sufficient. One of the charges is laying the precognition before the Lord Advocate; and the Jury return a general verdict.


Cockburn.—We think the clauses are conjunctive. Without malice, the transmission is nothing; and the malice is nothing, unless it induced him to transmit. We understood that the evidence of the two witnesses, as to their declarations, was rejected; for we took the objection, and they were only admitted to prove that they were fraudulently induced to sign; and there was not a word of this in their evidence.

LORD CHIEF COMMISSIONER.—This is a different objection, as it resolves into misdirection in point of law.

Cockburn.—We might have taken it in that form, but wished rather to apply on general grounds.

LORD CHIEF COMMISSIONER.—It is a very delicate matter, setting aside a verdict

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as contrary to evidence; and when there is much balancing of evidence, the Court will not interfere. But if there is a great weight of evidence, which the Jury have not considered, the Court will grant a new trial. Here the ground of the action was falsehood and malice, and the Jury have found damages. There was an opinion conveyed to them by the Court, but the question was left to them, and I still think properly left to them. I stated that I did not consider the conduct of the defender, in reference to the petition, to infer malice; but I left it to the Jury to compare the declaration of the witnesses with their evidence, and to draw their inference as to malice.

In this case, there was only evidence on one side, and the Jury were undoubtedly bound to pay great attention to it. But as the question of falsehood and malice was left to the Jury, whatever was my opinion at the trial, it would require a very strong case to induce the Court to interfere.

LORD PITMILLY.—I request leave to state a few remarks, not so much for the sake of this case, as of others, and from the possibility of this being quoted as a precedent. When the Lord Justice Clerk was called as a wit-

ness, your Lordship stated the great danger and inconvenience that might arise from the examination of a Judge of a Supreme Court; but, at the time, both parties were anxious that the examination should take place; and it was stated by Mr Jeffrey, that there was a case similar to this in the Court of Justiciary. I have since gone to examine the record, and the case was the common one, that the words of the witness were taken down at the time, and Lords Meadowbank and Hermand were called, to prove, that he then knew what he was about, and was not an idiot; but the Lord Justice Clerk (Hope), was not called; and so far as I know, the present case is the first instance of the kind.

It is a mistake to say, that it is the practice here to put Judges on their oath. It was allowed to a limited extent in the cases of Morison and Watt, but I hope they will not be followed as precedents.

In 1754, in the case of M'Killop, where his deposition was not taken down at the time, there is no Judge in the list of witnesses. In the case of Wilson, from the Exchequer, in 1768, there is no Baron in the list of witnesses, though there are counsel.

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After a careful examination of the records, I am of opinion, that there is no foundation for stating it to be the practice; and upon the present case, I agree in opinion with your Lordship.

LORD GILLIES.—I concur entirely on both points.

The Court therefore discharged the rule.

PRESENT,

LORD CHIEF COMMISSIONER.

DONALDSON v. EWING.

1821.
Jan. 11.

An action for remuneration for superintending the building of houses.

AN action for remuneration for trouble in superintending the building of certain houses.

DEFENCE.—The claim is prescribed. The service was understood by both parties to be gratuitous, and the defender did not benefit by it.

The Issues were, Whether the pursuer was employed to superintend, inspect, or direct the execution of certain buildings? Whe-

ther he did superintend? &c. Whether L.55, or what other sum, is due to him? or Whether it was understood that he was to act gratuitously?

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The first witness called having, on his cross-examination, been shewn a disposition to the property,

Jeffrey.—The defender must be aware that he is leading evidence.

LORD CHIEF COMMISSIONER.—I conceive that they are entitled to do this now, to shew that there was a written title to the property.

In opening the case for the defender, Mr Moncreiff stated, that he would prove, by a letter, that the pursuer's name, though in the contract, was there by mistake.

An opening counsel not entitled to read a letter, unless he believes that he shall afterwards make it evidence.

Jeffrey.—I object to reading this letter, and shall object to it when offered in evidence.

Moncreiff.—The question is, whether it was the understanding that the service was to be gratuitous.

LORD CHIEF COMMISSIONER.—The question is, whether this person was employed to superintend these buildings; and if this let-

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ter is necessary to make the case intelligible, Mr Moncreiff is entitled to read it, in the same way as he might repeat it, if he had it by heart. I am not now going to decide, what appears to me perfectly clear, that a person is not entitled to aver against his own deed. I have to deal with sensible men ; and if this is not necessary to make the case intelligible, they will not state it ; but we cannot tie up an opening counsel very strictly. Counsel must, however, state, what they intend to make evidence ; and we give the bar credit, that they will not state any thing but what they believe they shall make evidence.

Mr Moncreiff afterwards stated, that one of the defender's letters would shew how a case might be got up.

LORD CHIEF COMMISSIONER.—How can you make your own letter evidence for you ? You are not to suppose that I am to admit it as evidence because you are allowed to state it ; and though I am unwilling to interrupt you, yet I am very doubtful if we should allow you even to state this.

When a letter of Mr Young, agent at the time for the defender, dated 4th March 1807, was given in evidence,

More objects.—They are not entitled to prove against their own contract.

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Cockburn.—They mistake our object in producing it. He describes himself as an architect ; we dispute this, and wish to shew that his name was accidentally put into the contract.

LORD CHIEF COMMISSIONER.—My wish is, to avoid laying down any rules which may exclude any thing which ought to be admitted. It is clear, however, that you are not entitled to produce evidence to unsettle a deed ; you cannot gainsay a contract solemnly entered into ; and Mr Cockburn does not rest it on that ground, but says, though the pursuer's name appears in the contract, there was another person more trusted by the defender. The question is, how that applies to this case ; but this will be more properly adverted to in addressing the Jury.

Another reason is, that the writer is dead. Evidence is, by the law of Scotland, admissible of what a person deceased had said ; and the only distinction between proving what a person said, and what he wrote, is, that in the one case you have a witness on oath to prove the statement, and he is indictable for

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perjury; but I do not know that the law of Scotland has taken the distinction.

Mr Cockburn withdrew the letter.

Incompetent
for a defender
to produce a
letter from
himself, unless
the pursuer
was privy to it.

An objection was taken to a letter from the defender to a Mr Laidlaw, on the subject of their houses.

LORD CHIEF COMMISSIONER.—You need not state any reasons. Letters to the pursuer are received to explain the letters from him; but this is not in a course of correspondence with the pursuer, but to a third party, with whom the pursuer has no privity.

Moncreiff.—If the name of the pursuer being in the contract was sufficient, there was no use for the trial. If we are not allowed to prove all the circumstances, the justice of the case is excluded. The pursuer must have been privy to this.

LORD CHIEF COMMISSIONER.—I shall be very sorry, if any rule I lay down shall exclude the justice of the case; but on mature deliberation I shall state my opinion. I agree, that a case of circumstances may, and must be proved, and that the *res gestæ* must be proved; but this must be done by legal evidence. It will simplify this, to take it by

steps. If the defender were put in the witness box, you could not examine him. If he had said any thing on the subject, proof of that would be evidence against him, but not for him ; and in that case, having a witness upon oath, you are a step higher than in the present case, which is only a letter. This correspondence may enlighten your minds in the mode of conducting the case ; but it is not therefore evidence. The proof must be *viva voce*, and upon oath. How does it appear that the pursuer was privy to this correspondence ? and if not, how can it be used against him ? If you shew that he was privy to it, then it will be evidence against him ; but we cannot receive it, in respect of its contents, or allow you to prove his privy to it from the letter itself.

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An objection was taken to a letter, the handwriting of which had been proved by one of the pursuer's witnesses.

LORD CHIEF COMMISSIONER.—You might have cross-examined the witness from the letter, and confronted him with it ; and it is clear, that is what you ought to have done. The leaning of my mind, however, is to admit the letter, though I am not quite satis-

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fied upon it; it does not, however, appear to me to fix any principle.

A letter from the agent of the defender also rejected.

When a letter from Mr Young was offered, Jeffrey objects, he was agent; and this is the same as a letter from the party. He could not have been examined if alive.

Moncreiff.—It is decided, that an agent in a transaction is competent to prove that transaction.

LORD CHIEF COMMISSIONER.—Being agent in the cause might add to his bias in favour of the party, but cannot make his letters, any more than those of the principal, evidence against the opposite party.

Jeffrey, in opening the case, and in reply, stated the facts, and contended that he had proved them.

Moncreiff, for the defender, denied the employment, or that the work was done, or that there was any claim for remuneration.

LORD CHIEF COMMISSIONER.—This is a very short case; for, notwithstanding the time it has occupied, the real question is, whether the pursuer was employed as a tradesman, or was to act gratuitously.

The contract in which he is named is here ; and the only thing of importance to us is, that he is there named as a tradesman about those buildings. One witness swears that the pursuer did inspect ; and in one of the letters, he is desired to take care that the work is done, before he desires Mr Young to pay the money. As there are facts and circumstances, you must take this evidence into consideration, and balance it with the evidence of the other witness, who does not recollect his inspecting.

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On the whole, and from looking through the letters, it seems right to say, that this was not a gratuitous employment, but as a tradesman.

Verdict.—“ Find for the pursuer on all
“ the Issues ; and on the 3d Issue, that the
“ sum of L.50 is due to him, as a just and
“ reasonable charge.”

Jeffrey and J. S. More for the Pursuer.

Moncreiff and Cockburn for the Defender.

(Agents, *Tho. Lawson, and Campbell and Mack.*)

O'REILLY
v.
INNES, &c.

~~PRESENT,~~
PRESENT,
LORD CHIEF COMMISSIONER.

1821.
Feb. 13.

Damages for
apprehension
on a *meditatio*
fugæ warrant.

O'REILLY v. INNES, &c.

DAMAGES for apprehending the pursuer, as
in meditatione fugæ.

DEFENCE.—The warrant was properly obtained and enforced; and the statements are false and calumnious.

ISSUES.

“ 1st, Whether, on or about the 26th day
“ of August 1816, the defender did, in the pre-
“ sence of Richard Wooley, Esq. one of the
“ Justices of the Peace for the county of Mid-
“ Lothian, falsely depone, that the pursuer
“ was justly indebted to him, the defender,
“ the sum of L.30 sterling or thereby, being
“ the amount of an account for sundries, end-
“ ing on the 23d of August said year, for the
“ purpose of obtaining a warrant for summa-
“ rily apprehending the said pursuer, to the
“ injury and damage of the said pursuer?

“ 2d, Whether, on the occasion aforesaid,
“ the defender did emit a deposition, that he
“ the defender was credibly informed, and be-
“ lieved in his conscience, that the pursuer
“ was about to leave Scotland, in order to
“ avoid payment of his debts, without having
“ any probable ground for his belief, for the
“ purpose of obtaining a warrant for incarce-
“ rating the pursuer as in *meditatione fugæ*?
“ and whether the defender did obtain such
“ warrant, and did apprehend and detain the
“ pursuer, in virtue of the same, in custody, to
“ the injury and damage of the said pursuer?

“ 3d, Whether, on the occasion aforesaid,
“ when the pursuer was apprehended in vir-
“ tue of the warrant aforesaid, the pursuer,
“ or Mr Phillips, mail-contractor, in his be-
“ half, did offer sufficient security for his ap-
“ pearance in any action to be raised against
“ him for payment of L.30, the sum alleged
“ to be due to the defender? and whether
“ the defenders, or their agent acting by their
“ authority, did illegally refuse to accept of
“ said security, to the injury and damage of
“ the said pursuer?

“ 4th, Whether, on the occasion aforesaid,
“ the said Mr Phillips did offer a draft on
“ his cash account with the British Linen

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“ Company, to the defenders’ agent, for the
“ alleged debt, together with the sum of L.5,
“ alleged to have been the expences of the
“ warrant aforesaid, making in all the sum of
“ L.35; which offer was illegally refused by
“ the defenders, or their agent acting in their
“ name and authority, to the injury and da-
“ mage of said pursuer ?

“ 5th, Whether, on the occasion aforesaid,
“ and for the purpose aforesaid, the pursuer
“ did offer to consign the aforesaid sum of
“ L.35 in the hands of Mr William Trotter,
“ upholsterer, in order to be paid over to the
“ defenders, in case it should afterwards be
“ found due ? and whether the defenders, or
“ their agent acting by their authority, did
“ improperly refuse to accept of said consig-
“ nation, and liberate the pursuer, to the loss
“ and damage of said pursuer ?

“ Damages laid at L.3000.”

A witness re-
jected, there
being no chris-
tian name in
the list served
on the opposite
party.

The first witness called was — Wooley,
Esq. who was said to be the Magistrate who
granted the warrant.

Forsyth and *Cockburn* object, there is no
christian name or designation of the witness
in the list served upon us.

Jeffrey.—They cannot state that they

were misled, or did not know who was meant, which is the only reason for a list being given.

O'REILLY

INNES, &c.

LORD CHIEF COMMISSIONER.—This is one of the distressing questions arising from this rule as to lists of witnesses; and I do hope the bar will unite to correct the abuses introduced by it. *In hoc statu*, however, I feel myself bound to refuse the witness. If he had been described as Justice of Peace for the county of Mid-Lothian, or if his place of residence had been mentioned, I would have received him, as I do not consider the want of the christian name to be the same with the case of a wrong name. The admission that the signature is genuine, goes a great way to prove the warrant; and if the statement is proved as to the execution, it will shew that it must have been got at an early hour. I do not like going against a rule of this sort; and I hope, so long as it exists, agents will be attentive to have the descriptions accurate.

A similar objection was taken to the second witness.

Jeffrey.—In the list, we design him residing in Edinburgh; and the following day, as soon as we knew it, we stated his trade.

Circumstances in which a witness was received, altho' his designation was not given eight days before the trial.

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v.
INNES, &c.

LORD CHIEF COMMISSIONER.—What has been done on the present occasion, appears to me sufficient; and I may still allow the other witness, under the power given by the 24th section of the Act of Sederunt.

Circumstances in which a written document was admitted, altho' not produced eight days before the trial.

A witness for the defender was called, to prove a bill to be of the handwriting of the pursuer.

Jeffrey objects.—This was not produced eight days before the trial; and we did not expect it, as we refused to admit it to be genuine.—Act of Sed. 9th July 1817, § 5.—Russel, Form of Pro. App. p. 97.

Cockburn.—They must have known the document, as Mr Clerk mentioned it in opening the case. It is produced in the other action; and in the circumstances, the neglect was pardonable.

LORD CHIEF COMMISSIONER.—Mr Cockburn has stated an argument why I should receive this document, but has not stated any cause for not producing it before the trial. It appears that the pursuer had sufficient notice of it; and so far the object of the rule is attained; but I am called on to decide on a technical rule, which makes it very

difficult to disentangle the case, as the decision may affect the justice of both cases. The present is an application for damages, for an apprehension when no debt was due; and this document is offered to shew that the pursuer knew the debt was due. If it is admitted in the other case, the defender may have a verdict, though in this case there may be a verdict against him.

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v.
INNES, &c.



It was perfectly regular for the counsel to state the nature of the document, before giving it in evidence; and it was equally regular for the counsel on the other side, to stop the witness from speaking to it.

It is said the pursuer is in a worse situation than if it had been produced. The case appears to me new, and not provided for; but it also appears to me, that the justice of both cases cannot be got at, without admitting this evidence; and, therefore, I am led to reject the technical objection in favour of the justice of both cases. If I withhold this from the Jury, it would not be treating them in the manner I ought.

A letter was then tendered, which was said not to be produced in proper time. Mr Cockburn stated, that production on the same

A document rejected, having only been produced on the eighth day before the trial.

O'REILLY
v.
INNES, &c.



day of the week before, had been held sufficient.

LORD CHIEF COMMISSIONER.—The days must be counted according to law; and here I cannot exercise discretion. It would be setting aside the Act of Sederunt, were I to admit this.


When a witness was called,

Jeffrey objected.—They mean to prove by this witness, that he believed that the pursuer was about to leave the country, and that he was owing large sums of money. This is no defence, unless the defender knew it at the time.

Cockburn.—We mean to attempt to prove that he knew it, and are also entitled to argue to the Jury, that the reports were so general that he must have known it.

LORD CHIEF COMMISSIONER.—The defender must bring this home to himself; and I will give you credit, that you mean to call witnesses for that purpose; and that, if you fail, it will be want of proof, not of intention; but if you fail in this, the evidence now offered must be struck out. There are two ways in which it may be brought home; either by direct proof, or by shewing

the report so general, that he cannot be supposed ignorant of it. But it will not be sufficient to shew that the pursuer was in very distressed circumstances, and that he had borrowed large sums of money; for unless the defender knew this, he could not act upon it.

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v.
INNES, &c.


Clerk opened the case for the pursuer, and stated—No debt was due, as the gun was not delivered. The debt sworn to by the defender is four times the amount of that stated in the note sent to the pursuer. The question was referred to the pursuer's agent. The diligence was used at the time the affront would be greatest. There was no ground to believe the pursuer was leaving the country.

Cockburn, for the defender.—Whether a debt was due, depends on the question of accounting; and if the debt was due, the defender's oath was not false. Assuming that a debt was due, the questions are, whether we had grounds for believing that he was about to leave the country; and whether he offered sufficient caution. Whether a creditor is bound to take caution, or even consignation, is a difficult question of law.

Jeffrey.—In this case, as the person of the pursuer was invaded, damages are presumed

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~~~~~

due, unless they can justify their act. They have not proved that the debt was due, or that, at the time of the arrest, they had any ground to believe that the pursuer was going away, for the purpose of defrauding them.

The LORD CHIEF COMMISSIONER stated, —That the first question for the consideration of the Jury, was, whether a debt of L.30 was established to be due? On this point, he had to state, that the first threat of a *fugæ* warrant, was in a note from Innes, in which the debt is stated at only L.8. 15s.; and as the gun was retained, which constituted the principal part of the sum in the account, he was not in a situation to tell them that it amounted to a legal demand for L.30; but that they must consider on the evidence, whether the demand for L.8. 15s. was raised to L.30 the following morning.

That the second question was, whether credible information had been given, sufficient to raise a reasonable ground of belief in the defender's mind, that the pursuer had it in contemplation to leave Scotland, and return to Ireland, for the purpose of avoiding the payment of his debts?

On this it must be observed, that if they believed the evidence, it established that

O'Reilly wished to have his gun to shoot grouse in Perthshire,—that the road to Perth was not on the way to Ireland,—and that his object in going, was inconsistent with his escaping from his creditors. That there did not seem sufficient evidence to establish, that his proposing to go to Perthshire was a mere pretence, which was the only other explanation that could be given of the evidence.

O'REILLY

v.  
INNES, &c.

Verdict for the pursuer.

Immediately after the verdict in the preceding case, the following Issues came to be tried between the same parties, and upon the same evidence.

#### ISSUES.

“ 1st, Whether the defenders undertook to  
“ furnish a stock and locks to two gun barrels delivered to them for that purpose by  
“ the pursuer, and to deliver to him the gun  
“ in question, finished, previous to the 26th  
“ day of August 1816, so as to enable him,  
“ the pursuer, to set out to the shooting on  
“ that day? and whether the defenders im-

O'BAILLY  
v.  
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" properly failed to implement the said agree-  
ment ?

" 2d, Whether the defenders agreed to  
finish and furnish said stock and locks for  
the sum of L.18. 18s. ?

" 3d, Whether the barrels of the said gun  
required to be new breeched ? or whether  
the pursuer gave an order for the same to  
be new breeched ?

*Jeffrey*, for the pursuer.—The pursuer is  
entitled to a verdict on the 1st Issue. On  
the 2d no verdict is necessary, and on the 3d  
you may find either way.

*Cockburn*, for the defenders.—They have  
not proved any of the Issues.

LORD CHIEF COMMISSIONER.—From the  
manner in which this case is brought forward,  
it is difficult to pick out the evidence appli-  
cable to it. The first part of the 1st Issue is  
sufficiently proved; but on the second part, the  
evidence is more obscure. You are to say  
from the circumstances, whether the pursuer  
has proved affirmatively.

The 2d Issue must be found for the de-  
fender.

On the 3d, there is no evidence of the  
order.



**Verdict—**\* For the pursuer on the 1st Issue, and for the defenders on the 2d and 3d.

ROBERTSON  
v.  
BAXTER.

*Clerk, Jeffrey, and J. Campbell, for the Pursuer.*

*Forsyth and Cockburn for the Defenders.*

*(Agents, W. Dallas, w. s. and D. Fisher.)*

PRESENT,

LORD CHIEF COMMISSIONER.

ROBERTSON v. BAXTER.

1821.  
Feb. 14.

**REDUCTION** of a deed by the pursuer, ratifying one which his father had executed on death-bed.

Finding for a defender on an Issue, whether the pursuer was, by fraud and circumvention, induced to sign a deed to his *enorm lesion*.

**DEFENCE.**—The deed by the father was a proper deed, and the pursuer voluntarily executed the one under reduction.

ISSUES.

\* Whether the pursuer was induced, by  
\* fraud and circumvention on the part of the  
\* defender, or those acting for her, to sign

ROBERTSON

v.  
BAXTER.

“ the deed tested, this      day of March, one  
 “ thousand eight hundred and ten years, ratify-  
 “ ing the death-bed deed of settlement of his  
 “ late father, William Robertson, cowfeeder  
 “ in Canongate, dated eleventh July 1808,  
 “ without knowing or being aware of the con-  
 “ tents of the said deed of ratification, to his  
 “ great hurt and *enorm lesion* ?

A counsel not  
 being furnish-  
 ed with suffi-  
 cient informa-  
 tion to enable  
 him to conduct  
 a case, not a suf-  
 ficient ground  
 for delaying a  
 trial.

When the case was called for trial, Mr More, for the pursuer, moved to have it delayed, and to have another agent appointed for the pursuer, as, from the imperfect information furnished, it was impossible for him to conduct the case, and that, if any proceeding took place, it must be in absence of the pursuer.

*Cockburn* and *Alison* for the defender.—It is want of a *case*, not of an agent, which makes the pursuer wish delay.

LORD CHIEF COMMISSIONER.—To entitle me to put off the case, there must be a satisfactory reason stated, and an affidavit that it could not be known before the last day of Term. I have looked through the papers; and the witnesses in the list appear to me to be persons who probably know the facts of the case. I am very ready to do any thing

that the law will allow me to do, in order to get at the justice of the case. But the Act of Parliament is imperative; and the affidavit must state, that the agent abandoned the case so late, that the motion could not have been made during the Term. If the case goes on in absence of the pursuer, the defender must satisfy the Court that he has a case; and perhaps, on that ground, he may consent to delay. But as he seems determined to go on, the pursuer must either consent to a verdict going against him, or proceed in the state in which it now stands.

ROBERTSON

v.  
BAXTER.

Two letters were offered in evidence.

*Cockburn* objects.—They are offers to adjudge the case.

Incompetent to give in evidence an offer to compromise a case.

LORD CHIEF COMMISSIONER.—If they are for the purpose of compromising the case, they cannot be read, whether they were written before or after the action was raised.

*Cockburn*, for the defender, said—The simple case here is, whether a man signed a particular deed through fraud; and if he did, whether it was to his hurt. The pursuer, in a case of this sort, must bring the

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BAXTER.



strongest proof, as he is going in the face of his own solemn deed.

*Brownlee*, in opening the case for the pursuer, stated the facts from which he inferred the fraud; and in reply stated, that the property was admitted to be of considerable value.

LORD CHIEF COMMISSIONER.—I cannot allow matter to be stated to the Jury that is not proved. The defender insists that you must prove fraud *and* enorm lesion. You did not prove any thing as to the value of the property; and you cannot now call on them to make any admission as to the value.

*(To the Jury).*—In this case there has been some unnecessary delay, by the discussion as to the agent; for the evidence has been brought forward with as much advantage as it could have been, had the case been put off. The only evidence, to be sure, of value, has been brought by the defender; but it seems to have been omitted by the pursuer from design, not from want of preparation.

This case comes from and returns to the Court of Session, and both fraud *and* enorm lesion must be proved, to entitle the Court to

interfere, and the Issue must be taken all together.

ROBERTSON

v.  
BAXTER.

It is said, the want of the day on which the deed was signed, is a circumstance inferring fraud. But though in this there is a want of precision, the insertion of the day is not required by the statute prescribing the formalities of deeds.

The instrumentary witnesses were dead before this case was brought; but it cannot be said to be delayed till all were dead, as one person was alive at the date of the summons, who had been present at the execution of the deed. The case, however, now rests on the testimony of a witness, who is brought to swear to a conversation he heard ten years ago, in a spirit shop, between the writer of the deed, and one of the witnesses.

In considering this account of what the writer said, you will attend to the time of the day, the testimony of the other witnesses, and the book of the agent containing his account, which, as he is dead, is evidence, or at least admissible to try the truth of the witness's memory.

Evidence of what a dead witness has said is admissible, but it is the weakest evidence, and not of itself sufficient to prove a fact.

ROBERTSON

v.

BAXTER.



In a case of this sort you must have clear proof that this was not the act of the pursuer, but an imposition upon him. If you think it proved that he was asleep at the time the deed was prepared and read, that implies fraud; but if the facts and circumstances support the hearsay, you will find for the pursuer.

It is not every inequality that will make out *enorm lesion*; and what would be so in one rank, might not be so in another. This is a question for a Jury on all the facts and circumstances. The value of the property must be kept out of view, as even if this deed were set aside, the pursuer would not come into possession, but would merely be in a situation to call in question his father's settlement.

Verdict for the defender.

*Brownlee*, for the Pursuer.

*Cockburn* and *Alison*, for the Defender.

(Agents, *John Sommerville, jun.* and *Nath. Grant.*)

**FOWLER**  
v.  
**PAUL.**

PRESENT,

LORD CHIEF COMMISSIONER.

**FOWLER v. PAUL.**

1821.  
Feb. 19.

AN action of multiple-pounding by an executor, to ascertain who had right to one-fifth part of the property of the late Dr Fowler, in which the Court of Session sent the following Issue.

A finding for the pursuer on an Issue whether a person supported himself with propriety.

**ISSUE.**

“ Whether the late Andrew Fowler did  
 “ not support himself by his own industry  
 “ with propriety, and in terms of his father’s  
 “ will, from and after the 6th day of November  
 “ 1809, (when it is admitted his father died,)  
 “ till the said Andrew Fowler attained the  
 “ age of 30, exclusive of the period between  
 “ the 12th of April 1810, and the 24th  
 “ of April 1813, when it is admitted he was  
 “ serving in his Majesty’s service ?

FOWLER

v.  
PAUL.

In the multiple-poiniding, the claimants were the younger children of the testator, and the defender, who was assignee of Andrew, the eldest son. The clause in the will, upon which the question arose, was as follows: "The other fifth to be reserved, and placed in the funds, until my son Andrew shall have arrived," &c.

The Lord Ordinary, and afterwards the Court, decided in favour of the defender; but on a reclaiming petition, they altered the interlocutors, and sent the above Issue to be tried.

A probate of a will rejected, there being no witness called to prove the sale, &c.

The first evidence offered for the pursuer, was a probate of the will.

*Clerk and Murray*, for the defender, object.

—The will ought to have been produced.—  
1. Phillips, 397, 5th edit.

Even if the probate were proved, it would not be sufficient.—1. Phillips, 342.—But there is no evidence that this is the seal, or that these are the subscriptions, of the deputy registrar.—*Robertson v. Gordon*, 15th November 1814.

*Moncreiff*, for the pursuer.—The only claim of the other party, is under this will. By the law of Scotland, this probate is evidence, and proves that the will was produced in the Prerogative Court of Canterbury.



There is no necessity for proof of any writing in Scotland. The defender does not aver that this is not a genuine seal and subscription.

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v.  
PAUL.



*Clerk.*—The question is, whether this parchment proves the will. We ought to have had a witness to explain it, and also the opinion of English lawyers, on the meaning of the indefinite terms of the will.

LORD CHIEF COMMISSIONER.—Among many questions which arise in this Court, this is the one which, of all others, occasions the greatest anxiety.

In this case, the parties have been litigating since 1816. The right of the defender is by virtue of an assignment to a sum claimed under the conditions of the will; and if he had been called upon, there is no doubt that he would have admitted the will, as he did the death of Dr Fowler.

If the Court of Session were as much in the habit of directing Issues as the Court of Chancery, I have no doubt that they would have directed that this probate should be received as evidence of the will. But the difficulty now is, whether, after the Jury are sworn, and can only be relieved by consent, I

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shall turn the party round on a mere technical objection.

Were I to introduce my private knowledge into this case, perhaps there are few who have had more experience, as to this seal and the signatures; but I mention this, that I may lay it aside.

I am most anxious not to decide this on the law of England, but on the principles of the law of Scotland; and I am most unwillingly brought to the decision. But here I think I have principles of the law of Scotland, as well as of England, and all civilized states, to guide me.

The act of a Court, within the province of that Court, must be held sufficient; but in a foreign country, these acts are mere matters of evidence, which must be subject to the common rule.

In England, the law of Scotland must be proved as a fact, and the documents authenticated. In England a bond must be proved by a witness, but in Scotland a deed does not require such evidence, but must have certain solemnities. If such a deed were produced in England, it would not be necessary to prove the subscription; but it would be sufficient to prove that such evidence was not necessary in

Scotland; and the law being thus proved, the deed would be received.

Does this deed come proved in this manner?

If I were satisfied with the proof of this probate, I would admit it to be read, as the same accuracy is presumed as to a foreign will, as would be presumed of a will within the province of the Court.

The case of Robertson goes the whole length of this, that there must be proof of what is necessary in the country from which the document comes.

This is a separate country, and we must reject this, as no witness has been called to prove the correctness of the document, the signatures, and seal.

The claim by A. Fowler was then offered.

*Clerk*—Objects.

LORD CHIEF COMMISSIONER.—According to this view, the Court of Session sent the case here to be tried, when there was no will in existence.

After mentioning the cases of Leven and Young, Vol. I. p. 350 and 376, and Thomson and Clark, Vol. I. p. 167, Mr Clerk withdrew the objection.

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v.

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FOWLER

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A pursuer giving part of a process in evidence, does not entitle the defender to insist that he shall produce the whole process.

The claim was then given in, and part of it read.

*Murray.*—They must give in the whole pleadings; and we are entitled to have a minute and the interlocutor upon it read. In the case *Harper v. Robinson*, *ante*, p. 393, the declarations were held part of the precognition, and were read. In Thomson's case, it was held that proceedings in the Court of Session only proved the allegation of the party, not the existence of the deed.

*Cockburn.*—Do they mean to say, that, by our giving one document in evidence, they are entitled to give in any part of the process?

*Clerk.*—We are entitled to all matter explanatory of that document.

**LORD CHIEF COMMISSIONER.**—The rule is, that when a party reads part of a document or proceeding, he need not go farther than he chooses; but he puts the whole in evidence; and the other party is entitled to have the whole of it read. The question is, whether what you propose to have read is *pars ejusdem negotii*. The pursuer gives in part of the proceedings in the Court of Session, and you say you are entitled to give

other proceedings, as cross to this matter. I must first know what you propose to give in, before I decide this. I am anxious not to decide any thing as to the reply; indeed that is a subject of which the Court should never know any thing,

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PAUL.



It is said that the document given in by the pursuer, entitles the defender to give, at this stage of the cause, any evidence from the process, that may be an answer to the action. I shall regret if the Court has laid down any such doctrine. After looking at the document, his Lordship said—I am sorry that I intimated any opinion before seeing this document. It is complete of itself, and is given in to prove that there was a will; but it is admitted that this does not fix it on the present defender. Can it be held, that in justice or common sense, you are entitled to range through all the productions? Whatever is *ad idem* in this document given in by the pursuer, may be read; but my opinion is, that you are not entitled to range through the other documents at present, though it will be competent for the defender afterwards to offer them in evidence, and to shew that they are competent evidence.

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v.

PAUL.

The raiser of  
an action of  
multiple poinding  
received as  
a witness.

When the executor was called as a witness, *Murray* objects.—He is the raiser of the multiple-poinding, and is liable for the consequences.

*Moncreiff*.—He merely brings the money into Court, and has no interest.

*Clerk*.—The interlocutor must be read; and I will shew that he is an incompetent witness.

LORD CHIEF COMMISSIONER.—It is not necessary to read the interlocutor, as his being a mere party on the record, I should not think sufficient. In all cases of this sort, I think the Chancellor would direct that such a witness should be examined; but in a case involving the proceedings of the Court of Session, it is impossible for me to proceed, except on general principles.

Lord Gillies afterwards came into Court, and the question as to the competency of the executor being called, was again agitated.

*Clerk*.—The executor has a large fund to account for, and has to justify himself in bringing the multiple-poinding, and to account to every one for his share. May not his conduct in the case subject him in expences?

*Moncreiff*.—He is clearly admissible, as he

has consigned the money. Even if he had not, what interest can he have in this Issue? If he had *not* paid, he must pay to some one. Even an administrator is admissible.—Reid v. Gardyne, 10th July 1813.

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PAUL.

LORD CHIEF COMMISSIONER.—My great anxiety was not to run into any technical difficulty; and from that I shall be perfectly relieved by my brother. If there is no technical difficulty, my opinion on general principles is clear, that it must be made out that he has an interest. In this case he brings the multiple-poinding; in that action he must pay to one or other, and must thus account for the last fraction. All that he can get by his evidence is, that he may shift the responsibility; but still, if he remains responsible to one or other, this does not relieve him from any thing.

LORD GILLIES.—I have attended to this objection, which is, that the witness is a party, and has an interest. It may sound strange; but the raiser of a multiple-poinding is in many cases made a party, without his knowledge or consent. In this case, whether it is raised by the witness or the party interested makes no difference; for the summons merely

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PAUL.

states, that he has a sum to which he has no claim; and all he wishes is to know to whom he ought to pay it, which does not appear to me to make him a party, to the effect of excluding him from being a witness.

The second objection is interest; and that excludes a witness, whether he is a party or not. In this case, it is a matter of indifference whether the witness accounts to A or B; and the only way of supposing him to be interested, is to suppose that one will, and the other will not, exact it. Suppose the case of a tenant whose landlord dies, and that the legitimacy of the heir is disputed; could an objection be taken to the tenant as a witness, that he expected the one party to be more favourable than the other?

Mr Miller, the executor, was then called. On his re-examination, he was asked if he gave in a minute, consenting to pay over the share of Andrew Fowler, in consequence of a consent from the family.

*Clerk objects.*—This is incompetent: the terms of the minute will appear from the paper.

**LORD CHIEF COMMISSIONER.**—The only



question is, if they are not entitled to this, in explanation of the cross-examination. During his cross-examination, I stated that the minute would answer for itself; but I think they are entitled to this, in explanation of the answer given to a question put by Mr Murray, in the cross-examination.

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PAUL.



A witness was called, who had been servant to an aunt of Andrew Fowler, about six years ago, when he was living in his aunt's house; and was asked, Whether did Andrew Fowler behave regularly, or did he stay out whole nights without leave?

*Clerk* objects.—They must first prove that at that time Fowler was under 30. But the question has not the slightest relation to the Issue, which is, whether he supported himself; and whether he used proper means for doing so. The Issue, which is taken from the will, is not very intelligible, and ought to have been explained by the opinion of English counsel; but as that was not done, we must take the words as they stand.

LORD CHIEF COMMISSIONER.—The real questions here are, Whether this witness can speak to the time? and Whether it is admissible under the Issue?

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The witness stated, that the time she speaks of was six years ago; and it is proved that Fowler was born in 1786. There therefore appears no objection as to the time.

The next question arises on the words of the Issue, which are taken from the will. The money is to belong to the son in a certain event, that is, if he supported himself by his own labour, and if, while so supporting himself, he acted with propriety; the meaning of which I hold to be, acting with correctness in pursuit of that support.

Had I taken an objection to the question, it would have been, that it was a leading question; but as that is easily corrected, we come to attend to the merits. The pursuer is trying to shew that he did not comply with the condition in the will; and is it, or is it not, an ingredient in this, whether he lived regularly or not? I cannot direct the order in which they are to prove their case; and in common sense, is not this an ingredient in the proof? At the same time, I never would think of stating to the Jury, that evidence of dissipation, though it is clearly admissible, was sufficient to support the case. As to the

effect of it, I have already said as much as is proper at this stage of the proceeding.

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PAUL.

Another witness was asked if Fowler acted with propriety? An objection was taken to the answer, that it was not evidence.

Incompetent to ask a witness whether a person acted with propriety.

LORD CHIEF COMMISSIONER.—I cannot take this, as I think it is not evidence. They ought to ask as to facts, and the Jury will form their opinion, and draw the conclusion,

Another witness was asked as to certain facts; but an objection was taken, that the time was not fixed.

*Moncreiff*.—It is competent for us to bring evidence of his conduct after he was 30; to shew his habits before. The other party had notice of this in our condescendence.

LORD CHIEF COMMISSIONER.—It would tend very much to dispatch and regularity of proceeding, if you would fix the time. This may run into shades, but I cannot allow evidence after he was 30. It is extremely difficult for the Court to restrict the evidence to the exact period to which it is properly applicable. I do not mean to lay down any

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general rule as to how far a condescendence is a notice to the party, as in many cases the condescendence may be sufficiently precise to be held as notice. But if an Issue coming from the other Court restricts the question to narrower limits, I do not see how we can go beyond it. In the present case, I understand the proof to be limited to the periods from his father's death till he entered the navy, and from the time he left the navy till he was of the age of 30, but exclusive of evidence as to his conduct after he was 30.

Incompetent to prove the declaration of a person after he has assigned a right to affect the interest of the assignee.

A witness was asked if Andrew Fowler died in the hospital at Dumfries, and if he had declared that he did not support himself.

*Clerk* objected—That this was posterior to the assignation to the defender.

*Moncreiff*—His dying a beggar shews that he could not have supported himself with propriety only two years before. We have nothing to do with the assignation here.

LORD CHIEF COMMISSIONER.—If taken abstractly, the declaration of a party may be given in evidence, though made after the

period to which the evidence applies. The only question, therefore, is, whether the declaration of one person can be brought to affect another to whom he has assigned his right. When the declaration is made subsequent to the assignation, I cannot see any principle of justice to warrant giving it in evidence. This, therefore, does not turn on the time at which the declaration was made, in reference to the period to which the proof is restricted; but on the principle that the declaration by a person after he has parted with a right, cannot be brought to affect the party to whom the right was assigned.

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v.  
PAUL.

An objection was taken by the defender, that the designation of a witness was not sufficient; a wrong name being worse than a blank.

A witness admitted, altho' imperfectly designed in the list.

Reference was made by the pursuer to the case of — Wooley, Esq. in the case of O'Reilly and Innes, *ante*, p. 416.

LORD CHIEF COMMISSIONER.—I cannot conceive that any prejudice can be done by admitting this witness. In substance and justice this witness ought to be called and examined.

In the course of his examination, he pro-

A document rejected, not having been produced eight days before the trial.

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v.  
PAUL.

duced a complaint in an inferior Court, part of which was printed ; and was asked to explain the manner in which certain blanks were filled up.

*Menzies and Clerk.*—Parol evidence is not competent to prove what took place in a Court. This is not a record, and ought to have been produced as any other document.

*Moncreiff.*—This is a principal record, and we could not produce it before the trial.

LORD CHIEF COMMISSIONER.—It is not necessary here to enter into the question whether this is a record which cannot be removed or not. If I had been conducting the case, I would have thought parol evidence sufficient of what took place in a Court of this description. But the present question is regulated by the 5th section of the Act of Se-derunt, 9th July 1817, by which a diligence should be applied for ; and if it is a record that is called for, a note should be served on the Keeper of the Records. This paper has not been treated in the way that a written document ought to be treated ; and I do not think this a case in which the party is entitled to call for the exercise of the discretion vested in the Court, and therefore I reject this paper.

A witness re-  
jected, having  
been improper-  
ly designed.

When another witness was called,

*Clerk* objected.—He is not designed as a porter, though he is one.

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PAUL.

LORD CHIEF COMMISSIONER.—I understand that chairmen are not porters, and therefore sustain the objection. I never saw such a case as this, and hope I never shall again.

*Cockburn* opened the case, and stated that the Jury had only to try the fact in the Issue; that he would prove Fowler a complete profligate; and that, instead of supporting himself with propriety, he did so by begging, borrowing, and stealing.

*Clerk*, for the defender—Stated that Dr Fowler did not breed his son to any profession, and used him ill; that the son succeeded to half of his grandfather's fortune, and lived upon that, when not employed in the navy.

LORD CHIEF COMMISSIONER.—What we have now to attend to, is the question at issue, and the evidence on oath, by which that question is supported; for statements unsupported by evidence, must be disregarded.

The question before us comes from the Court of Session, who wish certain facts to be ascertained, before giving an opinion on the terms of Dr Fowler's will. We are not

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PAUL

here to judge of the import of the will, but to take the terms of the Issue, and apply to them the evidence and the principles of common sense. It has been correctly said, that the persons called have been of the lowest order, and that no person has been called to prove, that in his opinion Fowler acted with propriety. It would have been objectionable to have called evidence, of whatever rank the witnesses might be, to prove that in their opinion he acted with propriety. Some of the questions put to those who were called, appeared so objectionable, that I suggested that the opinion wished to be drawn from them was the conclusion to which the Jury must come on the proof of *facts*, and not opinions. Of the rank and situation of the witnesses you will judge, in estimating the credit due to them, but not in valuing any opinion they may have given on this subject.

The terms of the Issue are the terms of the will, and the first fact is the date of Fowler's birth. The pursuer made a *prima facie* case, shewing that Fowler was born in 1786; and this must be taken as the date, there being no evidence on the other side. This would make the terms of the will apply to six years; but from this must be deducted



the time he served in the navy; and what was said as to his conduct during the period he was in the navy, must be thrown out of view, and also any evidence that may apply to his conduct after he was 30, as this Court was of opinion that the Court of Session meant so to limit the question. Mr Miller, the executor, said he would not have paid this sum; but that is merely proof of his opinion, and it ought to be put out of view, which is the strongest proof that we are not to take the evidence of opinion.

From the terms of the Issue, it is clear that the pursuer had to struggle with a negative proof; but on the facts proved, you are to judge if this person supported himself with propriety. It is said you are to judge of this according to the conduct of other sailors, that being the line of life in which he was. I am not sure if I can state it to you in this manner, as there is pregnant proof of what the father meant, and the son was not a sailor till after his father's death; but he did get into the navy; and if you find him anxious for employment in that profession, that is matter for your consideration. There is an absence of evidence as to his endeavour, while out of employment, to get back to the navy;

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PAUL.

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v.  
PAUL.



and it is matter of notoriety, that the peace was not till after 1813. Several of the prominent facts proved, if they stood alone, might not be more than could be proved of many young men in the present state of public manners; but the Jury must consider whether, when taken together, they do not prove a habit; and whether, in the circumstances, it could be said that he supported himself with propriety. It would probably be better to find a verdict in terms of the Issue, than to return a general finding for the pursuer or defender.

Verdict—"Find that the late Andrew  
"Fowler did not support himself by his own  
"industry with propriety, and in terms of  
"his father's will, from the date of his father's  
"death, until the said Andrew Fowler attained  
"the age of 30, exclusive of the period  
"when it is admitted he was in his Majesty's  
"service."

*Moncreiff and Cockburn* for the Pursuer.

*Clerk, J. A. Murray, and Menzies,* for the Defender.

(Agents, *Thomas Lawson* and *P. Campbell.*)

1821.

THE JURY COURT.

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BROWN  
v.  
WINTOURS.

~~THE~~

PRESENT,

LORDS CHIEF COMMISSIONER AND JELLIES.

~~THE~~

BROWN v. WINTOURS.

1821.  
March 15.

DAMAGES for defamation.

Damages  
claimed for de-  
famation.

DEFENCE.—A denial of the defamation as charged. The defenders only stated facts when regularly called as witnesses in a Court of Justice.

It was said that an old lady had hired a room in the Grass-market, Edinburgh, and had deposited furniture, and other property, in it; and that the defenders had raised and circulated a report that the pursuer had broken into the room, and carried off the property.

The Issues were, 1st, Whether the defenders said that the pursuer had broken into a room, and stolen, or secretly carried away, furniture and valuable property? or, 2d, Whether it was

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WINTOURA.

true that the furniture had been deposited in the room, and was carried off by the pursuer? 3d, Whether, in an examination before a Magistrate, the defenders maliciously, and without probable cause for believing it true, stated that the pursuer broke into the room, and stole, or secretly carried away, the furniture, &c.?

An objection was taken to a question, whether a witness got any information on the subject of the furniture, from Miss Downie.

*Hope.*—It is said the defenders originated the story, and we wish to prove that the information was got from others. We could not call Miss Downie, as, till we heard this lady named in the course of the evidence, we did not know from whom the information was got.

LORD CHIEF COMMISSIONER.—The ground on which it is contended that the question is competent, is, that the witness is not here, and that the information of her being a material witness, has come out in the course of the trial. This circumstance, however, will not alter the nature of the rules of evidence. The real question here is, whether we can get from this witness, the hearsay of another; or whether, if that witness were here, the evidence would be relevant.

This is an action for defamation, and the question is, whether the defenders defamed the pursuer. Any thing as to defamation by another person, is not in this cause, and is not matter to be got at, even on cross-examination of the witness, if she were here. It is not the less defamation, that it may have been stated by another; and the evidence is irrelevant in any view of the case. If general report were proposed to be given in evidence, still proof of particular facts would not be admissible. The evidence, therefore, appears to me incompetent, even if the principal witness were here. It is premature, however, to suppose that I hold any thing proved against the defenders.

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v.  
WINTOURS.  


During the cross-examination of the sixth witness for the pursuer, the LORD CHIEF COMMISSIONER asked the counsel for the pursuer if they had any witness who could speak to *the words* in the Issue, as the cross-examination was unnecessary; but that it was difficult to prevent it; as, after the witnesses were dismissed, others might be called, who would render the cross-examination material.

A witness was afterwards called to produce

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v.  
WINTOUR.  


a plan of the house; to which an objection was taken, that it had not been lodged with the clerk.

LORD GILLIES.—Is this a plan of the *stair*? I really think the pursuer had better get on a little with the proof of his case, before he proposes to produce this.

It was then proposed to prove that the furniture, &c. was placed in this room.

LORD CHIEF COMMISSIONER.—The question here is not whether the furniture was placed there, but whether the words were spoken. If the furniture was not placed there, it will no doubt aggravate the damages; but I submit to you whether the words are proved. On the 3d Issue, the words are proved.

At the close of the evidence for the pursuer, the LORD CHIEF COMMISSIONER stated, that the Court were of opinion that there was a manifest distinction as to the proof of the Issues, and that it would be so stated to the Jury. That on the first there was no evidence to sustain the defamatory words; but that on the third there was a case to go to the Jury, and calling for an answer from the defender. His Lordship suggested to the

counsel for the pursuer, whether it would not free the case from the trash, were it sent to the Jury on the single Issue.

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v.  
Wintour.

This was not agreed to; but the case was opened for the defenders, and the son of one of the defenders (and brother of the others) was offered as a witness, there being a *penuria testium*.


LORD CHIEF COMMISSIONER.—This is not a transaction of the nature that admits of the plea of *penuria testium*.

Fullarton in opening, and Jeffrey in reply, stated the facts, and maintained that the defenders had not made out their defence.

Moncreiff.—In this case the pursuer at first charged the defender with extra-judicial slander, and called as defenders all who could be witnesses. They must now limit their case to the third Issue, and upon it they must prove malice.

LORD CHIEF COMMISSIONER.—I shall be extremely happy if I can be of any service in clearing the ground in this case; but it is one peculiarly for the Jury, there being contradictory evidence as to the residence of the old lady. There is here a question as to com-

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v.  
Wintour.



mon popular defamation, and as to what may be called judicial slander.

When words are laid in a specific manner in the Issue, the import of them, at least, ought to be proved. There is only one witness to prove the private slander; and you will consider whether the witness proves the words in the sense in which they are used in the Issue. There are seven who prove that the words were stated solely in consequence of the judicial inquiry. You will also consider whether a surmise of something unfair with respect to the property of another, might not have arisen from the judicial inquiry; for it is not necessary that it should have amounted to a felonious act.

The act charged in the 3d Issue, is the same as in the 1st; but the question is, whether it was done maliciously, or whether it was a pure judicial statement? We are bound, when judicially called on, to make statements; but we are equally bound not to make this a cloak for calumny. There are circumstances making out a *prima facie* case, that the furniture was deposited in the house; and that would be sufficient to take off the presumption of malice, if there were no proof on the other side. But on the part of the pursuer,



several witnesses were called; and you have the declaration of Wintour, which the pursuer has made evidence, by producing the pre-cognition, to shew that this old lady did not reside in this house. You are to say, on comparing the testimony, whether there was probable reason for the defenders making the statement.

BROWN  
v.  
WINTOUR.  


Verdict—For the defenders on the first and third Issues; and finding the first part of the second Issue proven, the second part not proven.

*Jeffrey and Fullarton for the Pursuer.*

*Moncreiff and Hope for the Defenders.*

(Agents, *Hotchkiss and Tytler, w. s.*, and *Campbell and Mack, w. a.*)

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v.  
BAILLIE, &c.

PRESENT,  
LORD CHIEF COMMISSIONER.

1821.  
March 17.

CHAPELAIN v. BAILLIE, &c.

Damages for  
the rent of a  
house.

AN action for the rent of a house let to the  
defender.

DEFENCE.—No bargain was concluded.

#### ISSUES.

“ Whether, at Edinburgh, on or about the  
“ 16th day of December 1819, the defender,  
“ Archibald Christie, servant to Lieutenant-  
“ General Mathew Baillie, did hire, or agree  
“ to hire, for the use of the said General  
“ Baillie, a house or lodging, No. 18, South  
“ Castle-street, from the pursuer, for the pe-  
“ riod of four months, from the 16th of De-  
“ cember aforesaid, at the rate of L.12. 12s.  
“ per month? And, whether the said de-  
“ fenders, one or both of them, have failed to  
“ implement the said agreement, by refusing  
“ to pay the stipulated hire at the periods the  
“ same became due; and whether they still  
“ continue to refuse to pay the same?

“ Whether, at Edinburgh, on or about the  
 “ 16th day of December 1819, the defender,  
 “ Lieutenant-General Mathew Baillie, did by  
 “ himself, or by Archibald Christie, his ser-  
 “ vant, acting in his name, and by his autho-  
 “ rity, hire, or agree to hire, the house or  
 “ lodging, No. 18, South Castle-street, in the  
 “ City of Edinburgh, from the pursuer, for  
 “ four months from the said 16th of Decem-  
 “ ber, at the rate of L.12. 12s. per month?  
 “ And, whether the said defender, General  
 “ Baillie, has failed to implement the said  
 “ agreement, by refusing to pay the stipulat-  
 “ ed hire at the periods the same became due;  
 “ and whether he still continues to refuse to  
 “ pay the same?”

CHAPMAN  
 BAILLIE, &c.

An application was made on the 6th De-  
 cember 1820, to separate the case of the two  
 defenders; and another on the 19th February  
 1821, to separate the two Issues.

When parties  
 are joint de-  
 fenders in the  
 Court of Ses-  
 sion, the Jury  
 Court will not  
 grant separate  
 trials.

On the first application, the LORD CHIEF  
 COMMISSIONER stated—That he did not  
 think it fit matter for the Court to look  
 into at that time; and that there was a  
 technical difficulty in the way, as they were  
 joint defenders in the Court of Session. On  
 the second occasion, his Lordship said—

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v.  
BAILLIE, &c.

If the two Issues are tried together, and if it comes out that the servant was made a party, to deprive the master of his testimony, I would direct the Jury to return their verdict, first as to the servant, and then as to the master, as it would then be the duty of the Court to interfere.

A witness, who had attended General Baillie as a sick nurse, having stated, on her cross-examination, that the General did not like a letter sent to him by the pursuer, and that he had given up the house,

*Jeffrey*, for the pursuer, objects.—This is not evidence, being merely declarations by the defender.

LORD CHIEF COMMISSIONER.—The evidence is given ; and I do not at present think it incompetent. You asked the witness as to what the General said ; and they are entitled to sift the witness, to explain her answer to your questions. But proof of the contract being abandoned, or of its never having been entered into, cannot be got from declarations by General Baillie.

It is clear that you may cross-examine, to the full extent of the examination in chief, to try the truth of the evidence in chief ;

and also to all matter that may try the accuracy, or the general character, of the memory of the witness. The point here is, whether the questions are fair, to explain what you asked; and I so consider them.

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v.  
BAILLIE, & Co.

*Brown* opened the case for the pursuer, and stated—That Christie, the servant of General Baillie, looked at the house, and agreed to hire it; and ordered fires, and some additional furniture.

*Moncreiff*, for the defender.—The pursuer mistook a mere looking at the house, for hiring it. There is no evidence of authority to Christie, and he had no authority to take the house.

*Jeffrey*.—The hiring is proved; and if hired, it must be held to be hired for the General.

LORD CHIEF COMMISSIONER.—The question here is, Whether the contract of hiring was completed? or Whether there was only an intention to hire? One part of the Issues is now out of question; and the points are, Whether Christie had authority to hire the house? and Whether the house was hired?

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v.  
BAYLIE, &c.

This is one of those contracts which is not reduced to writing, and where parol testimony is admissible; for though there is a letter in this case, that letter is not intelligible without the parol testimony.

The first witness is the one on whose testimony the hiring depends; and if you think the hiring is established, then the authority to hire must be drawn from all the circumstances of the case.

The testimony as to the precise date, is subject to the observation that has been made upon it, that the witness did not specify the reason for remembering it. You saw the witness Christie, who appeared to me a fair witness, and he has now no interest to speak falsely.

As to the agency, this is not a matter requiring written authority; and it appears to me, that this person acted with others as if he was so employed; but there is no evidence of his being so employed; and his own evidence goes to prove, that he had no authority.

The rent might have been proved by proving the value of the house. It has not been distinctly proved, but seems fairly stated in the schedule.

Verdict—" For the pursuer on the second  
 " Issue, against the defender, Lieutenant-Ge-  
 " neral Mathew Baillie, damages L.52. 12s.  
 " 5<sup>d</sup>."

FORTEITH  
 v.  
 THE EARL OF  
 FIFE.

*Jeffrey and Brown for the Pursuer.*

*Moncreiff for the Defenders.*

(Agents, *James Crawford, w. s., and Campbell and Clayson, w. s.*)

PRESENT,

THREE LORDS COMMISSIONERS.

FORTEITH v. THE EARL OF FIFE.

1821.  
 March 20.

DAMAGES for defamation in a judicial proceeding, and for afterwards circulating the calumny.

Damages  
 claimed for de-  
 famation in a  
 judicial pro-  
 ceeding.

DEFENCE.—The averments in the summons are not, and cannot be, relevantly laid. The extrajudicial slander was not uttered.

The statements made by his counsel were different from what is alleged, and the defender believed, and had reason to believe the statements made to be true. They were made judicially, and are material to the question at issue.

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**v.**  
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**FIFE.**

**ISSUES.**


In this case the Issues were, “ 1st, Whether, in a cause in which the Earl of Fife was pursuer, and the trustees of James, Earl of Fife, deceased, were defenders, the following words, contained in a petition in the said cause, presented to the Second Division of the Court of Session, on the 9th day of January 1817—‘ He (*i. e.* Lord Fife) ‘might,’ &c. (quoting a paragraph)—are false, calumnious, and injurious to the character of the pursuer; whether the Earl of Fife, the defender, did himself, or by his agents, maliciously authorise the insertion of the said words in the said petition, to the loss and damage of the said pursuer ?

“ 2d, Whether, at a trial before the Jury Court in civil causes, at Edinburgh, on the 3d day of March 1817, in the said action between the Earl of Fife and the trustees of the late James, Earl of Fife, deceased, Francis Jeffrey, Esq. as counsel for the present Earl, did, in addressing the said Jury Court, in the presence and hearing of a great number of persons then and there assembled, use and utter the following words, or words to the following effect, viz. ‘ That,’



“ &c.” (*quoting the words alleged to have been spoken*): And Whether the words alleged to have been spoken, as aforesaid, are false, calumnious, and injurious to the character of the pursuer Forteith; and whether the defender did himself, or by his agents, maliciously authorise the said Francis Jeffrey, Esq. to use and utter the words aforesaid, or words to the same effect, to the loss and damage of the said pursuer?”

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2d and 3d.—The second and third Issues were in the same form, but contained other words alleged to have been spoken by Mr Jeffrey at the trial.

“ 5th, Whether notes of the proceedings in the trial aforesaid, and containing the false and calumnious words aforesaid, or part thereof, were circulated or published in the counties of Banff and Elgin, or elsewhere, by the said defender or his agents, or others acting under his authority, to the damage and injury of the pursuer?”

Mr Cook, who was agent for the Earl at the trial mentioned in the Issues, was asked as to his recollection of the words used by the counsel.

The notes of the short-hand writer, the proper evidence of what passed at a trial.

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LORD CHIEF COMMISSIONER.—This is not the best evidence; and though it may be good in confirmation of the short-hand writer, still I think the most satisfactory way would be to call the short-hand writer; and after he proves his notes, to ask Mr Cook if that agrees with his recollection.

The short-hand writer was called, and stated that he had not been able to find his original notes of the trial—that they had been mislaid, lost, or taken from him without his knowledge. A copy was made of the extended notes, and part of it sent to Mr Cook, and part to Mr Jollie, the opposite agent.

*Thomson*, for the pursuer, stated that he was uncertain how they ought to proceed.

LORD CHIEF COMMISSIONER.—The Court cannot tell you how to conduct your case, but they can inform you what is the best evidence. In a case of this sort, the best evidence is the original note, and the short-hand writer to swear to the translation of it. You must make out that the notes are not to be found; and the Court will consider what is to be done, and what may be competent in absence of this evidence.

The transcript was produced by Mr Jollie

and Mr Cook, and they were examined as to whether the notes gave a correct account, so far as they recollected, of the terms applicable to the pursuer.

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Mr Cook ~~was~~ again called as a witness for the defender. There ~~being~~ some doubt as to the propriety of his answering a question put to him, the LORD CHIEF COMMISSIONER observed—The silence of an agent is the privilege of the party, not of the agent; and the party, by calling his agent, waives that privilege.

A party, by calling his agent as a witness, waives the privilege of secrecy in the agent.

On a question whether Mr Cook observed any discrepancy or variance betwixt the statements made by the pursuer, at the two interviews he had with him previous to the first trial,

In an action for maliciously defaming a witness, competent to prove the information on which the defamatory statements were made.

*Thomson.*—We are not here inquiring into the truth of the evidence given, but allege that the defender went out of the case. This matter is irrelevant to the Issues, and we had no warning to be prepared to meet it.

*Jeffrey.*—Malice is to be drawn from facts and circumstances. The pursuer states, that up to the day of the second trial, the defender

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treated him as before; and it is material to shew the history of the change of opinion. The statements were made in consequence of legal advice, and not from malice.

LORD CHIEF COMMISSIONER.—I believe the Court have no doubt upon this. It is perfectly clear, that the case resting on malice, and the malice resting on the conduct of the party, it cannot fairly be left to the Jury, without allowing the defender to put in the antidote. It is for the agent to state what took place; but unless it is brought home to Lord Fife, it goes for nothing.

Competent to prove the general import of a letter, without producing the letter.

The witness having stated that he did observe a discrepancy, and wrote Lord Fife fully on the subject,

*Thomson*.—That letter is not produced.


LORD CHIEF COMMISSIONER.—The evidence of the discrepancy I consider good, but if you wish the terms of the letter, it must be produced.

In an action for maliciously defaming a witness, competent to prove that circumstances affecting his credit were collected and communicated to the defender.

The witness having stated, that it was the opinion of the defender's counsel, that the pursuer ought not to be called as a witness at the second trial, was asked, Whether, in consequence of this opinion, he collected cir-

cumstances affecting the competency or credit of the witness? and Whether he submitted them to counsel?

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*Moncreiff.*—We challenged the defender to a proof of this nature, but he would not undertake it. There is no Issue on the subject; but he wishes now to repeat the calumnies, when we are not prepared to meet them.

*Clerk. and Jeffrey.*—We do not consider ourselves bound to prove the information true, but merely that the information warranted the objection being made. We are ready to go into a proof of this, if they are hardy enough to meet us; and they were bound to be so before allowing the question to be put, Whether it was done falsely? If they wished us to specify before coming to trial, it was *their* duty to call on us to do so, as was done in the case of Scott and M'Gavin, *post*, p. 486. All we mean to ask is, if Mr Cook had reasonable grounds to believe it true.

*Thomson.*—It is agreed that the issue must bind all parties. We allege falsehood, and they have never averred the truth. As they did not plead the truth, we could not call on them to specify; and now they wish

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to have the same benefit as if they had specified.

LORD CHIEF COMMISSIONER.—When Mr Moncreiff, in his opening, stated this question, I was naturally led to the consideration of the competency of the evidence; and now, when the question occurred, I was ready to give judgment, on hearing the statement for the pursuer. But as this case is new in species, though not in genus, I am happy that it has been more fully argued, as it affords more time for consideration. It is impossible, however, that a judgment given in the course of a trial, can be so maturely considered, as one where the Court has more time for deliberation. The question is, Whether we are to allow Lord Fife to go into a course of examination, to rebut the allegation of malice, and to shew that he had such information as ought to operate on a fair and honourable mind?

The question in the Issues differs from that of popular slander, which consists in making statements injurious to another person, without sufficient or compulsive cause. In that case, the calumny can only be taken away by a proof of the truth of the statements, and in such a case, we have compelled a party to put the truth in issue.

But in a case of such slander as the present, where a party following his interest is advised to make certain statements, the rule is quite different. On the one side, the averment is, and must be, that the statements were malicious; on the other, the answer is not that they are true, but that he had reasonable grounds to believe them, and to act as he did.

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The case belongs to the same class with that of giving a character to a servant, which it is the duty of the master to give; and no one ever thought of putting it in issue whether the information was true. All that it is necessary for the master to prove is, that he had good reason to believe it true, and evidence of that may be given on the general issue. An issue on the truth could not be allowed in this class of cases, as the question is not the truth of the statements, but whether the person was credibly informed.

When a person has an action brought against him, for giving a character of a servant, or any other case which is not a voluntary unlawful act, the way of rebutting the malice is, by proof of the grounds he had for giving the character, or making the statement. And in the present case, I do not think in-

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justice will arise from allowing the investigation.

Mr Cook was then examined as to the information he received; his having laid it before Lord Fife's counsel; their resolution to state the objection; and his opinion whether the statements at the trial went beyond what the information warranted.

During his examination, he was desired to look at a paper of queries which he had sent to Mr Young, agent in the country for Lord Fife; and an objection was taken to the question whether he understood it to contain holograph answers by Mr Young.

LORD CHIEF COMMISSIONER.—My difficulty in allowing this is, that you are calling on this witness to state the information he got from Mr Young, who is the person who ought to be called. It appears to me that this difficulty arises from the minuteness of the inquiry, and that it would be quite sufficient to ask Mr Cook the general question.

Competent to prove statements made in presence of a defender, without calling the person who made the statement.

A witness being asked whether he heard Mr Walker repeat a statement made by the pursuer, subsequent to the first trial in Lord Fife's case,

Thomson objects.—This is hearsay ; they ought to call Mr Walker.

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LORD CHIEF COMMISSIONER.—The question is, whether Lord Fife got the information. 'We cannot tell them which witness to call first. By this witness they mean to prove, that the communication was made to Lord Fife in presence of this witness.

Moncreiff opened the case for the pursuer, and stated—That Lord Fife had brought an action ; that the pursuer was called as a witness ; that a new trial of one of the Issues was applied for, and obtained ; that in the application for the new trial, at the trial, and subsequent to it, his Lordship had made such an attack on the character of the pursuer, as rendered the present action necessary.

That he would prove the habits and character of the pursuer ; the society in which he lived ; and the estimation in which Lord Fife held him, up to the date of the first trial ; the change after the trial ; the words spoken by the defender's counsel ; the impression they produced ; the effect of such statements ; and the circulation, by one of Lord Fife's factors, of notes of what had been stated.

That in a case of this sort, the falsehood


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~~~~~

was presumed; and if the other party meant to prove them true, they might have got issues for that purpose. We called on the defender to specify in this case, as was done in Scott and M'Gavin; but he declined doing so, knowing that his proof would fail.

We thought proof of falsehood sufficient to entitle us to a verdict for damages in this case; but the Court held we must prove malice. Malice is to be inferred from the facts; and if the statements are false, you will, from the atrocious nature of the charges, infer malice.

*Clerk*, for the defender.—When the pursuer was called as a witness, the defender had an interest, and consequently a right, to state all legal objections to his being examined. He was entitled to state the objection, to affect the credit, if not the competency of the witness; and stated the objection *optima fide*, as he acted by the advice of counsel. In support of his action, the pursuer must maintain, that though a party has a good objection to a witness, yet it is unlawful to state it. On the principle contended for, neither general nor special objections can be stated to a witness. We cannot, as in England, state general ob-

jections to a witness; but it was formerly competent to state special objections. There must be some means of doing so in this Court; and scarcely any thing short of knowing the statements to be false, will subject the party in damages.


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An attempt was made to prove malice; but it is clearly established that the defender never would have made the statements, had he not had a material interest to do so.

*Thomson*, for the pursuer.—The defender knows, that, in the criminal court, no such proof would have been allowed, and could not expect it to be allowed here. The only possible reparation for such injuries was an apology or an action; and you will judge whether daring the defender to a proof of these calumnies was not the best course to follow.

The defender would not admit that the statements were made; but he cannot now deny that they are proved. Not having been proved true, they must be held false—and being false and calumnious, they must be held malicious. There is no instruction from the other Court as to the proof of malice; and bringing forward such statements where he knew they could not be proved, is what law

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holds malice. We were taken by surprise in the proof admitted to shew his reason to believe the statements true.

The defender is liable for the acts of his counsel, and the statements were as injuriously as they were falsely made.


LORD CHIEF COMMISSIONER.—This case had its origin in two former trials; and though the pursuer is not a person of great rank, yet we must do the same justice to the rich and to the poor; and the humblest individual is as well entitled to claim redress as the highest.

When the pursuer was called at the first trial, he was at first merely examined as an instrumentary witness; but afterwards, and at the second trial, he was examined at length. Some proof was brought of discrepancies in his testimony; but we are of opinion, that that cannot enter into your consideration in forming your verdict.

In the present case, the Issues were prepared in the Court of Session; but they would have been the same if prepared here. The pursuer, in his summons, stated this to have been done maliciously; but in the future proceedings, he dropped the allegation of malice; and the Court would not send Issues,

until this was again inserted. The statement which a party is called upon to make in prosecuting a claim, is very different from voluntary slander ; and in this case it is decided by the Court of Session, and I would have held so, though there had been no such decision, that the statement must have been made maliciously, to entitle the pursuer to recover. The malice, too, is not merely to be inferred from the statement ; but it may be shewn, by proving declarations of ill-will, or from the statement having been made against knowledge, or wantonly and without knowledge.

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Evidence has been given, and properly given, to shew the familiarity with which the defender treated the pursuer ; and you are to consider whether, at the time of instructing his counsel, he was in possession of the information on which he now rests his defence.

On the last Issue, which would be popular slander, we upon the Bench are clear that there is no proof bringing it home to Lord Fife ; and though a person in the employment of Lord Fife gave notes of what was stated, yet communicating the notes was his personal act ; and on other parts of the case, there is strong evidence that the defender wished to repress discussion on the subject.

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The main issues are the second and fourth, and the material part of the second is alternative. Material facts have been proved, but they are not to exclude you from consideration of the malice ; for you must consider whether, subsequent to the defender calling him as a witness, he had proper information to take off the malice.

In the cross-examination of General Duff, there is a most material passage on the question of malice, as it shews *quo animo*, with what disposition of mind the defender acted at a subsequent period, and that there was no malevolence ; and evidence to the same effect was given by another witness.

You have seen an instance to-day of the liberty which may be used with a witness, and the nature of the questions that may be put. I am not disposed to draw a distinction between what is asked of the witness, or offered to be proved by others. The witness no doubt may refuse to answer, but putting the question is not without prejudice to the witness.

On the part of the defender you have had evidence of the inquiries made—the communication to counsel—and that he did not urge them to make the statements. You

have had evidence of the information he had; and the only question is, if the defender had fair and credible information, and reasonable ground to make the statement; for proof of the truth of the facts would not have been competent.

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The words are proved. The question is, whether the justification is proved; and if you think the statements were made with a pure mind, you will find a verdict for the defender?

Verdict—"For the defender on all the  
"Issues."

*Thomson, Moncreiff, Lumsden, and Robertson, for the  
Pursuer.*

*Clerk, Jeffrey, and J. A. Murray, for the Defender.*

(Agents, *J. S. Robertson, w. s. and Inglis & Weir, w. s.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

M'NAB v. TELFER.

SUSPENSION of a threatened charge on a bill

1821.  
June 18.

A bill found to be a fictitious document, but that it was not represented at the time of delivery, as good and sufficient.

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of exchange, on the ground that the only consideration given for it was a bill, which the charger knew to be a forgery.

#### ISSUES.

“ 1st, Whether the bill in process, dated  
“ 20th May 1819, for L.66. 12s. purporting  
“ to be drawn by Joseph Johnstone, and to  
“ be accepted by John Campbell, Preses of  
“ the Society of Grocers and Spirit-dealers at  
“ Dalry, in the county of Ayr, which bill is  
“ admitted by the defender to have been the  
“ value given by the said Joseph Johnstone  
“ to the pursuers, in return for the bill  
“ charged on, was a fictitious and false docu-  
“ ment, in respect there was no such person  
“ as John Campbell, the supposed acceptor,  
“ and no such company as the Society of Gro-  
“ cers and Spirit-dealers at Dalry aforesaid ?

“ 2d, Whether, at the time the pursuers  
“ received the said bill, dated the 20th May  
“ 1819, the defender represented to them that  
“ the said bill was a good and sufficient or  
“ genuine document ?

“ 3d, Whether, at the same time the pur-  
“ suers received the said bill, dated the 20th  
“ May 1819, the defender knew or believed



“ that the said bill was a false and fictitious  
“ document ?”

M'NAB

7.  
TELFER.

A witness having stated that he had formerly discounted with a bank, a bill which he got from the defender, and which not being paid, the defender promised to take up from the bank, was asked by whom the bill was accepted.

Incompetent  
to prove, by  
parol evidence,  
who accepted a  
bill.

*Cockburn*, for the defender—Objected.

LORD CHIEF COMMISSIONER.—Was any notice given to the defender to produce this bill? If notice was given, or if it is proved that the bill is lost, this may be competent, but not otherwise. I have no objection, however, to take the evidence that the defender retired the bill; but I cannot take parol evidence of who accepted it.

*Jeffrey* opened the case for the pursuer, and stated—The question here is, whether there was no value given for the bill in question, and whether the pursuer was by fraud induced to put his name on it. We shall prove that Telfer knew that this was a forgery. This is not a question for punishment; but resisting an attempt to recover.

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from the pursuer a debt due by an outlawed felon.

*Cockburn*, for the defender.—The observations and evidence do not apply to the Issue. The pursuer has undertaken the proof of a transportable felony. Even in the civil question, the presumption of innocence applies, and you must have direct proof of the crime. We are not here to try or form any opinion on the question of value.

On the second Issue there must be a verdict for the defender. There is no evidence of any representations by him.

On the third the pursuer makes his stand; but the evidence does not apply; for the witnesses, though they disputed Johnston's solvency, never suspected forgery.

LORD CHIEF COMMISSIONER.—The case has been closed without any evidence for the defender, and none was necessary. It is quite true that we are only to find the fact; and a distinct answer to the questions in the Issues is all that is necessary, as the case is not final here.

There is no difficulty on the first Issue, as it is admitted that the bill is a fictitious docu-

ment; but it is extremely material to attend to the terms of the other two Issues, as they are to determine the case.

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The Issue is inaccurate in not stating the date of the transaction, which I shall state as the 14th August 1819; and the time is material, as the question is, whether at that time the defender knew that this was fictitious. There is no doubt of what has been stated, that fraud must be proved, and is not to be presumed; but it is also clear, that being of a secret nature, direct evidence is not to be expected, but it is to be inferred from facts and circumstances.

After stating the evidence on the second and third Issues, his Lordship said—That if the Jury took the same view of the evidence with him, they would find for the defender on the second Issue; and that on the third, they must consider whether the statement, that “things were not in a right course with Johnston,” applied to his credit, or his conduct relative to this transaction.

Verdict.—“The Jury found the bill a fictitious document: That the defender did not represent it as a good and sufficient document: That it was not proven that he

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“knew or believed it to be a fictitious document, at the time he gave it.”

*Jeffrey and M'Neill for the Pursuer.*

*Cockburn and Anderson Blair for the Defender.*

(Agents, *D. Mactavish, w. s.* and *Thomas Cranstoun, w. s.*)

PRESENT,

THREE LORDS COMMISSIONERS.

1821.  
June 25.

SCOTT v. M'GAVIN & OTHERS.

Damages for  
defamation.

AN action of damages for defamation.

DEFENCE.—The defender being ready to support by evidence, every statement made by him, waives an objection to the relevancy on the ground of counter-defamation, by the pursuer or his friends.

The pursuer, in this case, is the Roman Catholic clergyman in Glasgow. The present was an action of damages for defamation inserted in the Glasgow Chronicle newspaper; and in three numbers of a publication called

the Protestant. The Issues contained an admission that the passages were written and composed by the defender, M'Gavin, and published by his authority ; and after quoting the passages, which were long, the question was put, whether they were of and concerning the pursuer ; and falsely, &c. held up and represented him as " having improperly extorted " money from the poor of the Catholic persuasion, for the purpose of erecting the Catholic chapel in Clyde-street, Glasgow, to " the damage," &c.

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The defender asserted, that what he published was true, and there were four Issues on the *veritas convicii*.

1st, Whether the pursuer refused to baptise the child of Henry Courtney, a person of the Roman Catholic persuasion, and contributor to the chapel, until he should pay up his contribution ; and afterwards refused him confession, because he had not paid it ?

2d and 4th, Whether he refused to baptise the children of Philip M'Geechie and John Drain, because they were in arrear in their contribution ?

3d, Whether the pursuer applied to two individuals, manufacturers in Glasgow, to re-

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tain "a portion of the weekly earnings of  
"such Catholics as were employed in their  
"works, to be applied towards building said  
"Roman Catholic chapel?"

March 6.

At a meeting for preparing the Issues, previous to the trial,

To entitle a party to prove the truth of libellous matter, he must take Issues on special facts.

*J. A. Murray* and *Moncreiff* said—If the statements are not proved false, they are not slanderous, as it is not a *convicium* to say that a person extorted money. It is merely saying that he obtained it by presenting strong motives. The nature of our defence is, that the statements are true; and we will prove the general fact, and give some instances; but as we have not a diligence, we cannot specify all the instances we shall prove.

LORD CHIEF COMMISSIONER.—You state the question to be, whether this is slanderous, and you may argue this at the trial; but it is quite a different question, whether you may prove the truth. No doubt you may take away the damage, by proving it not slanderous; but the questions, whether slanderous, and whether true, are quite different. You may shew by argument that it is not slanderous; or you may prove, in diminution of

damages, that the matter was generally reported; but if you mean to prove the truth of the particular facts, you must state them, with time, and place, and person, so as to put the pursuer on his guard what you mean to bring against him.

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We shall at the trial, but not now, say whether this is a *convicium*. Suppose a person accused of a heinous crime, it would be incompetent to attempt to shew that the accusation was not slanderous; but it would be competent to prove a general reputation in diminution of damages. But if it is intended to prove the truth of particular facts, they must be specified.

On the Issues for the pursuer, your defence is, that this was general discussion, and not done with a libellous mind. The Issues for the defender are on the supposition that the statements apply to the individual, and that they are libellous, unless they are true.

LORD GILLIES.—What do you mean by the general fact of extorting money, which you say you will prove? It is unintelligible to me. Another part of your plea does not seem very consistent. You say that these passages do not apply to the pursuer, but that they are true of the pursuer. You say if they

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apply to Mr Scott, they are true of him, but that they do not apply to him.

LORD PITMILLY.—It is quite clear, that in the former practice, to entitle a defender to a proof of facts, the answers must have contained a specification of instances, and the general averment has been repeatedly found not relevant.

A defender having delayed to amend his answers, not allowed to add new facts to them.

It was then proposed to allow the defender to amend his answers, which was opposed on the ground of the great delay which had taken place.

LORD CHIEF COMMISSIONER.—We may allow them to fill up the specification of particular cases which they have stated generally, but not to add any new cases.

LORD PITMILLY.—I think it would be taking them sharp to deny this.

This was accordingly allowed, and the above Issues in defence given.

When a justification is pleaded, a pursuer may bring evidence upon it, either in chief or in replication.

At the trial, when the pursuer was about to give evidence on the justification by the defender,

LORD CHIEF COMMISSIONER.—This is perhaps the best stage of the case for us to state what we conceive to be the regular



course of proceeding in this, which is the first case in which the *veritas convicii* has been stated as a defence.

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The counsel for the pursuer are quite regular in what they propose to do, and are entitled, if they are of opinion that it is the best course to follow, to produce their evidence on the *veritas* now; but if they proceed now, they must be aware that this is their whole case, and that they cannot be allowed to mend it, by calling farther evidence in reply. It is not, however, the whole case, so far as the cross-examination, or the veracity of the defenders' witnesses, may be concerned. The Court are at present of opinion, that the pursuer, if he thinks it proper, may reserve his whole evidence on the justification; but we also think it right that he should be aware, that by stopping here, he may be cut out of evidence, which would have been competent if offered in chief. By going into the proof at present, however, he will not afterwards be entitled to meet the defenders' evidence generally.

Mr Jeffrey thanked the Court for this suggestion, and stated it to be their intention to lay a *prima facie* case on this subject before the Jury.

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Parol evidence without a certificate of conviction, affords *prima facie* evidence that a person had been tried and convicted of a crime.

A witness was called, who stated, that M'Geechie had been tried in Scotland seven years ago, and that he was now in Lancaster jail for passing base coin. The witness then produced a certificate of the conviction.

*Moncreiff*, for the defender.—This is not evidence, and has not been produced before the trial.

LORD CHIEF COMMISSIONER.—There is a *prima facie* case without the document.

Circumstances in which a woman was received to swear to her being married to a man who cohabited with another as his wife.

A witness was called, and asked if she was married to John Drain.

*Moncreiff*.—They gave us no notice of their intention to prove such a fact. They mean to prove Drain guilty of a crime, and to bastardize his child without any certificate of marriage, or calling any witness who was present, or giving notice to Drain, or those interested in the child.

LORD GILLIES.—There is no proof that the child was legitimate. It is the constant practice to admit the testimony of the wife; and her evidence is most material.

*Cockburn and Jeffrey*.—We are entitled to prove that he was living in a state of bigamy; and are entitled to hold, that that was the reason of the delay in baptising his

child. The woman would not be a competent witness in a declarator of marriage, but she is so in all cases where she is not interested.

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**LORD CHIEF COMMISSIONER.**—The competency of evidence depends on the nature of the question to be proved. In the present case, the question is, Whether baptism was refused to the child of John Drain, until his subscription was paid? We have it in evidence; and it is common sense, though it had not been in evidence, that it would be a ground for delaying to baptise a child, that it was the child of a woman, not the wife of the person who presented it. If a woman, not the mother of the child, comes to a clergyman, and says, the person who is said to be father of the child was married to me, would not this justify the clergyman in delaying the baptism? It is not the best evidence of the marriage, but it is evidence sufficient to induce the clergyman to act in the manner he did; and in the circumstances of this case, I think it competent.

Mr Moncreiff excepted to this direction, 1st, As the woman was incompetent to prove her marriage. 2d, As it was incompetent to prove a special fact against Drain, to affect

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OTHERS.

his credit as a witness. *3d*, That the defender had no notice that it was intended to prove a fact of this nature.

A document rejected, not having been produced eight days before the trial.—An objection to the designation of a witness, after her examination, held to be too late.

The witness was then examined, and an objection was taken to the production of the certificate of marriage.

*Jeffrey*.—It is as competent as the books called for by the defenders.

LORD CHIEF COMMISSIONER.—The books are on the table; but I took the facts as proved by the witnesses, and do not mean to refer to the books. It appears to me, that the same rule applies to this as to any other document. You might have got it on the examination of this witness, as a haver *before* the trial.

Mr Moncreiff moved to have the examination of the witness struck out, as she was not properly designed, being described as residing near Airdrie.

LORD CHIEF COMMISSIONER.—It appears to me that the objection comes too late.

LORD GILLIES.—I do not understand this. I think four miles is near Airdrie; but she is not described as living near Airdrie, but at a particular place near Airdrie.

**LORD PITMILLY.**—I think the objection too late.

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Mr Cockburn afterwards intimated, that if the defender was only entitled to proceed in a certain manner, the case of the pursuer was closed.

**LORD CHIEF COMMISSIONER.**—We cannot call on the defender to disclose the mode in which he means to conduct his case ; but if justice requires replication, it may be allowed.

You have not proved any thing as to Courtney's case. I have taken the books as proposed to be given in evidence, if proved.

*Mr Jeffrey* stated—The hand-writing is proved, and also that it is customary to keep such books. The pursuer is the only person who could prove the facts. On an objection by Mr Moncreiff, the Lord Chief Commissioner intimated, that the Court were of opinion that the books could not be received in evidence.

The first witness called for the defenders was asked what was the character of Mr M'Gavin—whether he took a charge of, and was active in, the management of the public charities.

In damages for a libel, incompetent to prove the good character and benevolence of the defender.

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**LORD CHIEF COMMISSIONER.**—Even if the opposite party does not object, the Court cannot allow this evidence to be given. How can this be a defence against the charge of having published a libel? The defender cannot set up his character in defence. But it is competent for him to answer the action by proving the justification; or he may diminish the damages, by proving that the thing was generally matter of report before, and that consequently less damage was done by publishing it.

There has been no evidence as to special malice; there is only the general proof of publication, and that it applied to the individual. We cannot allow what is now offered to be given in evidence. We must reject it as irrelevant; but counsel may be certain that nothing will be stated to the prejudice of the defender's character. You may either put your question, and take an exception to our rejecting it; or you may move for a new trial, and take your exception at that time.

Not competent to read at a trial the deposition of a haver examined on commission.

The deposition of a person examined as a haver was afterwards put in.

*Jeffrey.*—This is not evidence. The de-

position of a haver can only be read to shew where the writings are, or to prove that an attempt was made to recover them; but not as evidence in the cause.

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*Moncreiff.*—Mr Jeffrey might have objected at the time the deposition was taken; but I am not aware of any rule which prevents a deposition being read, to explain how the writings are not produced.

LORD CHIEF COMMISSIONER.—We have had much conversation on this subject, as it has a strong bearing on the course of proceeding. The constitution of this Court clearly is, that no statement by a witness can be laid before the Court and Jury, except *viva voce* statements. It is only in a case of necessity, such as a witness being out of the kingdom, that he is examined on interrogatories.

The examination of a haver is merely to obtain production of a document, and ought not, as in the present case, to contain matter which is evidence in the cause. If depositions of this sort were admitted, it would be a means of laying a fact before the Jury, though not proved before them.

At first we used to have the havers brought forward to produce the papers at the trial;

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but now the production is made eight days before. If parties wish to have the evidence of the witness at the time he produces the document, they must call him as a witness at the trial.

LORD PITMILLY.—I think the familiar way to illustrate this to us, is to put the case of this having occurred in the Court of Justiciary. I do not know of any case having occurred, but if such had occurred, no part of the deposition would have been read, though the papers would have been received. If it were necessary to prove that they were produced by the party, then it would be necessary to put him in the witness box, and examine him; and I consider it competent to examine the pursuer now as a haver, if that is wished.

LORD GILLIES.—I perfectly agree.

A receipt for L.150, paid to public charities, was then offered in evidence.

*Cockburn*—Objects.

LORD CHIEF COMMISSIONER.—How does this bear upon the case? Is it admissible or relevant? Suppose a person writes a gross libel, would it be admissible to prove such a fact?



The Superintendent of Police at Glasgow having stated, that at the time the chapel was building, the report was current that the poor contributed, and that several of them admitted the fact—was asked who they were, and how many?

*Jeffrey.*—We must object to proof of particular instances, though, from respect to the Court, we did not object to proof of the general report.

*Mencreiff.*—This is not in proof of withholding church privileges.

**LORD CHIEF COMMISSIONER.**—The evidence now offered is to prove that individuals who were contributors to the chapel, were receiving public charity, which is not relevant to the inquiry. You cannot prove the truth of the report, to get quit of the claim of damage. In proving a report, you merely prove it true that it was reported; but not that what was reported is true. You may, I conceive, ask him whether what is stated in the Issues was currently reported.

The witness having stated that he made a report of the case of Widow Hanlin, was asked a question as to that report.

*Cockburn.*—Objects.

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In defence to an action for defamation, competent to prove that the slander was currently reported.

Not competent to prove that the slander was reported by another.

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OTHERS.



*Murray*, for the defender Sim.—We admit that this is not in issue, and that this is not proof of a current report. We are not bound to prove the truth of the story, but merely that the defender published a true account of what was stated to him, which is sufficient to rebut their charge of our maliciously having published a fictitious case.

*Jeffrey*.—We do not deny that this is specified in the condescendence; but they ought to have put it in Issue as true, or at least as given to them by this witness.

LORD CHIEF COMMISSIONER.—This case appears to have been entered by this witness on the report of Sim, which is only hearsay.

The way to get quit of a libel, is to prove it true; and to entitle a party to this proof, he must state time and place. He must prove the truth of the fact, and not merely that he heard it. In the present case, not having averred the fact, but merely the hearsay, we hold that he is not entitled to go into this evidence.

Incompetent  
to prove the  
*veritas*, without  
an Issue in jus-  
tification.

A witness was called to prove certain statements by the pursuer from the pulpit of the old chapel.

*Jeffrey* objected.—This is not in issue.

*Moncreiff*.—They have been allowed to prove that no such statements were made, and are we not to be allowed to meet this by proof of the fact?

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OTHERS.

LORD CHIEF COMMISSIONER.—Unless you can make out that a fact from the pulpit differs from another fact, we must reject the evidence. The question is disallowed, as no justification is stated.

*Cockburn* opened the case for the pursuer, and stated—That this was a pure question of calumny and injury. It will be said that the defender was discussing certain general questions; but with this the pursuer has no concern. The pleas of the defender are inconsistent, as he maintains that the statements did *not apply* to the pursuer, and that they were true *of* him. When compelled to specify the instances in proof that the statements were true, he could only mention four, and these he attempts to support by the evidence of infamous witnesses. If it is said he only published what was said by half the population of Glasgow, we deny the fact; and a party is not entitled to publish what is merely whispered.

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Moncreiff, for M'Gavin.—It is impossible to convey to the Jury the general impression produced by reading the publication in question ; but in the place where the defender resides, it is known that he is devoid of that malice which has been so liberally ascribed to him. The discussion was forced upon him by other publications, and can it be held that his answer is malicious? It is said to be inconsistent to maintain that the statements do not apply to the pursuer, and are true. They were not meant to apply to him, but on inquiry were found to be true, though at so great a distance of time it is difficult to prove them. The case sent by Mr Sim revived the question ; but Mr M'Gavin had no concern in that investigation. In a publication conducted by a committee of Catholics, the defender is accused of crimes.

LORD CHIEF COMMISSIONER.—What publication is that?

LORD GILLIES.—We have nothing to do with this publication, as you admit that it was not written by the pursuer.

Moncreiff.—The pursuer is not free of responsibility, and his conduct gave the defender reasonable ground to believe the statement by Sim to be true.

We are entitled to prove general reputation, and would have specified other instances, had not the pursuer refused us the means of finding out the persons, which appears from his examination as a haver.

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M'GAVIN &
OTHERS.

LORD CHIEF COMMISSIONER.—You may prove the fact that the pursuer denied having books; but I doubt if this is the proper way to prove it.

Moncreiff.—I am entitled to state that the pursuer gave an uncandid answer.

We shall prove the activity of the defender in doing good to the poor privately; his attention to public charities; the conduct of the pursuer as to the contributions, and his denunciations from the pulpit against defaulters.

Murray, for Sim.—This defender gave a fair statement of what was represented to him, and is not responsible for the truth of the facts, it having been his duty to report the statement made; *Forteith v. Lord Fife*, ante, p. 470.

LORD CHIEF COMMISSIONER.—The Court did not in that case lay it down, that the Superintendent of a public charity was not to be answerable for publishing what is false.

Murray.—This statement is the reverse of slanderous, as it afforded the means of inquiry.

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v.
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OTHERS.


In England; stating a hearsay does not render a person liable, provided he states his author; Starkie, p. 244 and 245.

Jeffrey.—The pursuer has nothing to do with the benevolence of the defender, or his controversy with other writers. It is not necessary to prove direct malice, but it is sufficient to shew that the statements are false, and were rashly made. The facts specified are not proved, and are not sufficient to warrant the charges made.

LORD CHIEF COMMISSIONER.—After the long, patient, and painful attention you have given to this case, I hope I shall not detain you much longer. The case for us is short, though it has been long in the statement, the proof, and the different discussions.

The general nature of the libel, though it contains various charges, is a charge of extortion.

In defence, what is termed a justification has been pleaded; and upon this, two questions arise: Whether the facts are proved? and if proved, Whether they cover the whole of the charge made? for if they do not cover the whole, then the part to which they do not apply, must stand on the evidence for the


pursuer; and the only question upon this part will be the amount of the damage.

[His Lordship here read part of the libel, to which he stated it as his opinion, that the justification did not apply. He then commented on the different cases stated in justification of the other parts of the libel, and pointed out what part of the matter given in evidence was to be taken into consideration, and what not.]

When a libel is produced, and either admitted or proved, law presumes falsehood, and from thence infers malice, but parties may add evidence on the subject.

In this case, I cannot state any doubt as to this libel applying to the party before us, and circumstances have been proved to shew the falsehood.

There was much discussion as to the competency of proving the truth of another instance, besides those specified in the Issues for the defender. To entitle the party to such a proof, he must state it in an Issue. A party may, indeed, without an Issue, prove circumstances in diminution of damages, such as general circulation of the slander before; but then it must be proved to be the same slander.

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v.
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M'GAVIN &
OTHERS.

In this case it is proved to have been stated that money was got by the subscription or contribution of very poor people, but this does not amount to what was published by the defender.

If you consider any part of the justification proved, you are to wipe out the corresponding part of the libel.

Some part of it I consider done away, some part not; and if you are of the same opinion, you will find damages.

Verdict—"For the pursuer, damages
"against William M'Gavin, L.100; against
"William Sim, L.20; and against Messrs
"Duncan, 1s. each."

Jeffrey and Cockburn for the Pursuer.

Moncreiff, J. A. Murray, and More, for the Defenders.

(Agents, L. & C. Gordon, and W. & A. G. Ellis.)

PRESENT,
LORD CHIEF COMMISSIONER.

SCOTT
v.
SCOUGALL.

SCOTT v. SCOUGALL.

DAMAGES for defamation, assault and battery.

1821.
July 16.

DEFENCE.—A denial of the summons as laid, and a plea of provocation and aggression, for which a separate action was brought.

Damages for
defamation, as-
sault and bat-
tery.

ISSUES.

“ Whether, on or about the 18th day of
“ November 1820, near the Exchange Build-
“ ings in Leith, and in presence and hearing
“ of Alexander Brodie, Patrick Hodge, and
“ Andrew Gray, merchants in Leith, or one
“ or other of the said persons, the defender
“ did falsely and injuriously say, that the pur-
“ suer was a liar, or a damned liar; or did
“ use or utter words to that effect, to the in-
“ jury and damage of the said pursuer?
“ Whether, on the said 18th day of No-

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SCOU GALL.


“ vember, in Bernard Street in Leith, the de-
“ fender did violently assault and strike the
“ pursuer, to the injury and damage of the
“ said pursuer? Or Whether, on the said
“ occasion, the pursuer struck the defender
“ first?”

Damages laid at L.2000.

Buchanan opened the case, and stated—
The real question is the amount of damages,
which the defender seems to admit, by offer-
ing L.15 as compensation.

Jeffrey, for the defender.—I do not deny
that a blow or push was given; but the pur-
suer called the defender a damned scoundrel,
and the blow was merely an insult, and not
attended with any injury. The Court can-
not hold words a justification for a blow; but
the whole case is in your hands, and I trust
you will not give damages.

Cockburn, for the pursuer.—The defender
is wrong in all his statements; and a counter-
action brought by him has been dismissed. An
apology would have been received, but the de-
fender repeats the insult by an offer of L.15. A

blow, by the manners of this country, though not by morality or law, and still less by religion, justifies the taking the life of the aggressor; and what damages will you give to a peaceful citizen who comes to seek reparation for such an injury?

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v.
SCOUGALL.

LORD CHIEF COMMISSIONER.—We are here, you will recollect, in a court of law, not of honour; and in a court nothing is better than coolness and deliberation in considering the cases which come before it. This case is peculiarly for you; but the sentiment with which the counsel for the pursuer concluded, makes me think it right to state to you, that moderation is the proper principle upon which to proceed in a civil court.

On the second Issue, the blow is admitted, and the manner in which it was given has been proved. There was much irritation between the parties; and probably you may be of opinion that, in the circumstances, it might have been as well settled out of Court. £15 were offered, but no apology was made; and that sum not having been accepted, you are not entitled to take it into consideration. How it may affect the costs, will be matter for the consideration of the Court in term,

WALKER
v.
ROBERTSON.

in this, which is the first case of a tender of amends.

Verdict—"For the pursuer on both Issues, damages L.100."

Cockburn and Buchanan for the Pursuer.

Jeffrey and Robertson for the Defender.

(Agents, *John Young and John Robertson.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1821.
July 17.

WALKER v. ROBERTSON.

Damages for defamation from the pulpit, and in a printed paper.

DAMAGES against a clergyman for defamation from the pulpit, and in a printed paper.

DEFENCE.—The defender acted under the instruction of the Kirk-Session. The statements in the paper must be shewn to be unfounded. The injury, if any was done, has been compensated.

In this case, the Issues were, Whether

the defender from the pulpit meant to hold up the late R. Walker, Esq. to derision and contempt, under the denomination of his adversary—or made an indecent personal allusion to him, as prosecuting a claim to an estate—or as never sitting down at the Lord's table—or as having defrauded the poor—or as a person upon whom the hand of God was already laid?—or Whether he printed a statement that Mr Walker had promoted a scheme for the relief of the poor, from interested motives?

WALKER
v.
ROBERTSON.

This case was originally brought by the father of the pursuer, and after his death the Court of Session sustained the title of his son to pursue.

On an objection to the question Whether a witness ever heard the defender from the pulpit allude to the late Provost Walker? the LORD CHIEF COMMISSIONER observed, that the question was competent, as it was merely inchoate. But on an objection to the question Whether the witness ever heard him say any thing about his adversary? his Lordship said, Do not suggest to the witness the words in the Issue. You are entitled to

In damages for defamation, incompetent to suggest words to a witness.

WALKER
v.
ROBERTSON.

ask her if she heard any thing which she applied to Provost Walker, and then to ask her what that was.

Even after general questions are put, incompetent to suggest particular expressions.

After putting several general questions, and the witness having stated that she did not recollect the particular charges made by the defender,

Jeffrey, for the pursuer—Suggested that he was entitled to put particular questions as to whether any thing was said of a meal committee, or fraud upon the poor.

LORD CHIEF COMMISSIONER.—It is clear you cannot put words into the mouth of the witness; but you may ask her what impression the statements produced on her mind.

On this subject, the doctrine in my opinion is (though there may have been aberrations from it), that you may lead a witness up to the question in dispute, but not in the question. In the present case, it is quite right to ask, Were you not at church? Did not the defender preach? Was there not allusion to the poor? But having got the witness up to the words in the Issue, the question is, How much farther can we go? Were you to ask, Whether he said Robert Walker defrauded the poor? that would be leading in the question.

In order to prove this, you must ask, Whether he said any thing of Robert Walker, and what that was? If at the distance of time your witness cannot recollect what was said, you must lose your case, from defect of the memory of your witness.

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v.
ROBERTSON.

When the second witness was called,
Forsyth, for the defender, stated---He is incompetent, as he was one of the meal committee, and caused the report to be printed in vindication of their character, which is the real object of this action.

LORD CHIEF COMMISSIONER.—This witness is clearly not interested in the cause. Whether you can state any thing to affect his credit with the Jury, is a different question; but he is clearly an admissible witness.

An objection was taken to a question by the pursuer, as to the character of the late Provost Walker.

Cockburn.—If they are to support his character, we wish it to be understood that we are entitled to attack it.

LORD CHIEF COMMISSIONER.—Undoubtedly the question is competent, and you are entitled to meet any part of their evidence.

In damages for defamation, a pursuer allowed to examine evidence as to his own character.

WALKER

ROBERTSON.

A defender may prove a paper by a witness for the pursuer, but must give it in evidence before it is read.

On cross-examination, the witness was called on to verify the report of the committee.

Jeffrey.—If they are to lead evidence, I do not object to this.

Forsyth.—The witness may read his own report.

LORD CHIEF COMMISSIONER.—The defender cannot produce this as evidence now, but he may identify this paper, if he means afterwards to produce it. In the Courts where this institution has been longer established, it is every day's practice to put a document into the hands of a witness, to identify and prove it, and then put it aside till the defender opens his case.

Incompetent to prove the *veritas*, without an Issue in justification.

On his cross-examination, a witness was asked, Did you ever hear Mr Walker acknowledge that he had received Sir John Henderson's assessment, and that he had not accounted for it, but meant to keep it in his pocket?

Jeffrey.—This is to prove the *veritas*; and there is no Issue on it; *Scott v. M'Gavin, ante*, p. 486 and 503.

Cockburn.—That case does not apply; and we are entitled to prove this under part of the 6th Issue, as *compensatio injuriarum*, or in diminution of damages.

LORD CHIEF COMMISSIONER.—On the particular part of the Issue to which this question relates, the same rule applies to cross-examination, as to examination in chief.

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v.
ROBERTSON.

This question was so recently and fully discussed in the case of Scott and M'Gavin, that it is unnecessary to go into detail. The Court is of opinion, that the question, as put, is not competent.

The question is not as to the generality of the circulation, but the truth of the statement; and to entitle a party to prove the truth, he must specify, and the question must be put in an Issue. The grounds on which we reject the present question, may be illustrated by a simple case. Suppose a person were accused of a crime, it would not be competent to prove the truth of the accusation by witnesses, without an Issue; and the same principle applies, whether that proof is by a witness, or the admission of the party.

Robertson opened the case, and stated—The defender transgressed the license allowed to the pulpit, by attacking an individual. If the paper had been published by authority of the Kirk Session, each of the members would be liable for it. They cannot prove

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v.
ROBERTSON.

compensatio injuriarum, as there is no Issue on that subject.

LORD CHIEF COMMISSIONER.—Do you mean to allow them a proof of this, by opening upon it?

Robertson.—Certainly not, but state it, to shew the line of defence which they at first pursued.

Cockburn.—The defender had a great deal of evidence to prove the truth of what he said; but by a judgment of the Court, this was held incompetent.

LORD CHIEF COMMISSIONER.—You are excluded from proof of the *veritas convicii*; but there is no judgment of the Court that you are not entitled to prove Mr Walker's conduct, in extenuation of damages.

Cockburn.—The words are slenderly proved; and it is necessary to prove either the words stated, or at least words of the offensive nature stated. There is no proof of the paper being circulated beyond those who were entitled to see it.

LORD CHIEF COMMISSIONER.—This action was originally brought by the father of the pursuer in 1818, and was carried on to such a point in the Court of Session, that the

son was found entitled to continue it. It was stated for the defender, that he came prepared to prove the truth of the statements; and he might have done so, if he had followed the proper course, before the Issues were prepared; but he must have known that he could not do so without an Issue, as that had been decided, after frequent discussion, in another case, only a month before these Issues were prepared. He might, however, without an Issue, have proved, that the thing was generally propagated before he stated it; or that Mr Walker was of such a character as not to be injured by such a statement. I think, however, he has judged wisely in not leading evidence.

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v.
ROBERTSON.

A Court and Jury will be cautious of giving such damages as will stain the cloth of a clergyman, or will prevent him from living in the manner he ought. At the same time, the pursuer did right in continuing the action for the vindication of his father's character.

His Lordship then went through the Issues in order, and stated how the evidence applied to each; and that, in his view, some of them were not proved, but that others were proved; and in some respects they were aggravated by statements in the answers to the condescendence.

WALKER
v.
ROBERTSON.

The Jury inquired if damages carried costs.
LORD CHIEF COMMISSIONER.—The question of costs is for the Court; but in general damages carry costs.

Verdict for the pursuer, damages one shilling.

(SECOND CASE.)

WALKER v. ROBERTSON.

Damages to a son for defamation of his deceased father.

This was an action of damages by the same pursuer against the same defender, for defamation of the late Mr Walker, after his death.

DEFENCE.—Descendants are not entitled to damages for calumnies against their predecessors, unless it applies specially to the descendants. The averments as to what was said are erroneous.

A witness called for the pursuer, was asked if the defender was reputed wealthy?

LORD CHIEF COMMISSIONER.—You can-

not get a fact from a witness unless he knows it. You may ask the witness in what style the defender lived, but cannot ask as to his wealth, unless the witness knows it.

WALKER
v.
ROBERTSON.



The Presbytery Clerk was called to produce answers by the defender, containing the statement complained of.

Cockburn.—We are entitled to have the petition read, to which this is an answer.

LORD CHIEF COMMISSIONER.—If the matter is *ad idem*, you are right; but, suppose a person ingrosses a separate paper in his answers, that does not entitle you to have the petition read. This is a struggle for the reply, which cannot influence the Court. The question is, whether this paper is to be given by them now, or afterwards by you; and to decide this, it is only necessary to know whether what they give in is intelligible or not without it.

LORD GILLIES.—This is not the answer, but a separate paper ingrossed in the answer.

Jeffrey, in opening the case, regretted that it had not been tried along with the other, and stated—The action is relevant; *Taylor v. Swinton*, not reported; and this

WALKER
v.
ROBERTSON.


case being sent to trial, proves it relevant. There never was a case in which more ample reparation ought to be given. The defender having overcome the sense of the sacredness of the office, shews his malice, and that office ought not to screen the individual.

Cockburn, for the defender.—You are not to give damages to punish the defender, but can only give them to repair the injury to the pursuer. I admit that the statements are proved, and feel great difficulty in explaining them.

The pursuer has got damages in the last case for the memorial, and is not entitled to claim them again.


This claim is professedly for solatium to the feelings of the pursuer, and a verdict will do this ; but the case is brought by his curator, who can have no such feelings.

LORD CHIEF COMMISSIONER.—In this case you have a very short duty to perform, as you have only to say what amount of damages are to be given as a solatium for the injury done.

You are to take this as a substantive and distinct case from the other, and are to consider whether the statements were not such as

ought to affect, and were likely to affect the feelings of a son. You are not to be misled by the statement that the pursuer must prove pecuniary loss ; for the law holds that a person may bring an action for an injury to his feelings, and money is the only reparation which the imperfection of our nature makes it possible to give. Even a matter of history may be a subject for claiming damages, if it is injurious to descendants.

WALKER
v.
ROBERTSON.



It is said the costs will be hard on the defender if you give damages ; but that is for the Court ; and you are to say what is the solatium to which the pursuer is entitled.

No evidence having been led for the defender, you are to throw aside the facts stated for him.

Taking the law from the Court that solatium is due, you are to say the amount.

Verdict for the pursuer, damages L.100.

Moncreiff, Jeffrey, and Robertson, for the Pursuer.

Forsyth and Cockburn for the Defender.

(Agents, D. Wilson, w. s. and Forsyth and M'Dougall.)

PORTEOUS &
HOWIE

v.
BEGRIE.

==

PRESENT,

LORD CHIEF COMMISSIONER.

==

1821.
July 18.

PORTEOUS & HOWIE v. BEGRIE.

Damages
claimed for as-
sault and bat-
tery.

DAMAGES by a man and his wife for assault and battery.

DEFENCE.—The facts are not correctly stated. The pursuers were the aggressors.

ISSUES.

“ Whether, on or about the 12th day of
“ March 1821, in the house of the pursuer,
“ in Dalkeith, the defender, Alexander Beg-
“ rie, did violently assault, strike, or kick,
“ Robert Porteous, pursuer, to the injury and
“ damage of the said pursuer ?

“ Whether, on or about the said 12th day
“ of March, in the said house, the defender
“ did violently assault and strike Marion
“ Howie, pursuer, to the injury and damage of
“ the said pursuer ? Or, Whether, at the time
“ and place aforesaid, the said pursuers, or
“ either of them, first assaulted the defender ?

“ Damages laid at L.1000 to each of the
 “ pursuers.”

PORTHOUS &
 HOWIE

“
 BEGRIE.

After calling several witnesses,

Jeffrey, for the pursuers, stated—The next witness we intend to offer, is the maid servant in the house. She will, of course, be objected to, as she is niece of one of the pursuers, but she is merely the natural daughter of a sister, and there is here a *penuria testium*, which Stair, Bankton, and Erskine, agree in holding a ground of exception.—*Sands v. M’Kinnon*, not reported.

The natural daughter of a sister of a party rejected as a witness.

LORD CHIEF COMMISSIONER.—Mr Jeffrey has, with candour and perspicuity, stated the situation in which the witness stands, and admitted that unless there is a *penuria testium*, she is not admissible. Where there were several witnesses present, unconnected with the parties, I cannot possibly say that this is a case for relaxing the general rule by which she would be rejected.

Another witness was called to prove the nature of the injury suffered, and Mr Jeffrey intimated that he intended again to offer the servant as a witness.

LORD CHIEF COMMISSIONER.—I do not

PORTCOUS &
HOWIE
v.
BEGRIE.

wish to interfere, but I doubt if you can call evidence of this sort, unless you have some other witness who can prove the assault. If they are called with the view of making the servant admissible, that is one thing; but if they are called to prove the extent of the injury, it appears to me that you must first prove the assault; and I submit to you whether it is proved.

Mr Jeffrey stated, that he considered the assault on the wife proved, and was allowed to call another witness, who, in the course of his examination, was asked as to the pursuers' character. This was objected to; but on a statement that the intention merely was to prove the pursuer in a respectable situation, his Lordship allowed the question.

After the examination of this witness, Mr Jeffrey again tendered the servant as a witness, and referred to Hall v. Otto, Vol. I. p. 442.

LORD CHIEF COMMISSIONER.—The case referred to was one entirely of presumption; and the situation of the present case does not appear to me to be altered. There may be something to go to the Jury as to the woman,

but I do not think sufficient on the other part of the case. In order to support a case of assault, there must be proof or circumstances sufficient to lead to the inference of who gave the first blow; as to the husband, I do not think any thing is proved; as to his wife, there is the evidence of the boy; and Mr Moncreiff may observe upon his evidence, or such part of the case as he thinks right.

PORTER &
HOWIE
v.
BERRIE.

(To the Jury.)—Were this case in the other end of the island, I should have no difficulty in leaving it to the Jury, without any observations; but I do not think this the proper course here, where the institution is new.

The injury in this case was very considerable; but before considering it, we must ascertain who committed the assault, and whether it is proved? As to the husband, this is not a case on which the Jury can decide by presumptions, as there was a witness present, who swears that the husband struck first. As to the wife, there is a balance of evidence. The boy swears that the defender struck her first; but he is a single witness. As there are facts and circumstances, it is proper to submit his evidence to you; but his age, and the circumstances in which he stood, make

BURREL, &c.
v.
HODGE.

me of opinion, that his evidence is not such as will be taken by a sensible Jury, in opposition to the other evidence.

Verdict—" For the defender on both
" Issues."

Jeffrey and Brownlee for the Pursuer.

Moncreiff and James Miller jun. for the Defender.

PRESENT,

LORD CHIEF COMMISSIONER.

1821.
July 21.

BURREL &c. v. HODGE.

Damages
against a com-
mercial agent,
for neglect of
duty.

DAMAGES against a commercial agent for neglect of duty.

DEFENCE.—The defender did every thing in his power for the interest of the pursuer. The pursuer cancelled the bargain.

ISSUE.

" It being admitted that, in the month of
" February 1820, the defender undertook to

“ act as agent for the pursuer, in the disposal
 “ of a quantity of pine timber, then lying at
 “ Leith ; and that, in the month of February
 “ aforesaid, Messrs William Hall and Com-
 “ pany made offer to the defender, acting as
 “ aforesaid, to purchase sixteen thousand four
 “ hundred and fifty-one feet of the said tim-
 “ ber, or thereabouts, at the price of one shil-
 “ ling and sixpence per foot, as it lay on the
 “ beach, and that the defender made this of-
 “ fer known to the pursuer ?

BURREL, &c.

v.
HODGE.

“ Whether the pursuer intimated to the
 “ defender that he was willing to accept of
 “ said offer ? and Whether the defender, con-
 “ trary to his duty as agent for the pursuer,
 “ concealed from, or failed to make known to
 “ the said William Hall and Company, the
 “ pursuer’s acceptance of their offer aforesaid,
 “ to the loss and damage of said pursuer ?”

A witness examined on commission, had
 been asked his opinion of the duty of an agent ;
 and at the conclusion, a case was put, and the
 opinion of the witness asked upon the suppos-
 ed case.

Incompetent
 to prove the
 opinion of a
 witness, as to
 the duty of a
 commercial
 agent.

LORD CHIEF COMMISSIONER.—What-
 ever may be the answer to the first question,
 I shall tell the Jury that they are to take my

BURREL, &c.
v.
HODGE.

opinion on the subject, and not that of the witness. I shall not prevent the answer given being read, but the second question is what we are to try; and it would be a great relaxation to allow the answer to be read.

Robertson opened the case, and stated, That the pursuer had employed the defender to sell a quantity of timber, and directed him to accept an offer made for it; but he concealed this letter, wishing to purchase the wood himself.

Jeffrey.—The question whether the letter was communicated is simple; but the real question is, Whether the defender is liable in damages for not communicating this letter, which was not an acceptance in terms of the offer, but left a discretion to the agent. The damage is not proved, as the wood was sold privately, and even at the time of the sale others were ready to give the price offered at first.

Cockburn.—Said that one fact was sufficient. Hall and Company sent repeatedly to know if their offer was accepted, and the defender concealed the letter he had received from the pursuer.

LORD CHIEF COMMISSIONER.—This ques-

tion arises out of a mercantile transaction, in which an agent is bound to diligence.

BURREL, &c.

v.
HODGE.

The admissions in the Issue are most proper; and there are three questions on which you must make up your minds before returning your verdict, though it is not necessary that you find them separately; a general verdict for the pursuer or defender will be sufficient.

The first is, Whether Burrel the pursuer accepted the offer of Hall and Company? On this question the important letters are two by Burrel. The first is not an acceptance; but the defender having written that that was a house of undoubted credit, you will consider whether the pursuer's answer was or was not an acceptance.

In general the Court construe a written instrument, and the Jury take the direction of the Court; but this applies more properly to cases of deeds and solemn legal instruments, or to missive letters; but in a mixed case like the present, I think it right to submit it to you, merely stating my views on the subject, for your consideration. You will therefore take the letters, and say whether, when taken together, they can bear any other construc-

BURREL, &c
v.
HODGE.

tion, than an acceptance of Hall and Company's offer.

The second question is, Whether the defender concealed this acceptance from Hall and Company? If the question of damage had been left open, concealment might have been an aggravation of damage; but in the present case, it is merely a question of whether he did not communicate the acceptance. The whole, in my opinion, goes to shew that the communication was not made; and if you come to this conclusion, then the third question arises, which is the amount of the damage. On this subject there is no appearance of any vindictive spirit; there is merely a claim for the difference of price, and the expence of seeking a market, which the pursuer was not bound to do, after accepting the offer.

Verdict--" For the pursuer, damages
" L.205. 1s. sterling."

Cockburn and Robertson for the Pursuer.

Jeffrey for the Defender.

(Agents, *Ro. Paul* and *John Young*, s. s. c.)

 AYR.

PRESENT,

LORD CHIEF COMMISSIONER.

BALLENTINE

v.

Ross.

BALLENTINE v. Ross.

1821.

Sept. 10.

DAMAGES against a Collector of Excise, for carrying into effect, by poinding and caption, a sentence pronounced by Justices of Peace, for a larger penalty than was authorised by the statute 29. Geo. III. c. 68. §. 93.

Damages against a Collector of Excise, for putting in force an incompetent decree of Justices of Peace.

DEFENCE.—The decree was regular, and regularly executed. The defender, as soon as he knew of the incarceration, gave directions to liberate the pursuer, and offered L.50 as amends, in terms of the statute.

ISSUES.

“ It being admitted, that the Justices of
 “ the Peace for the county of Ayr, on a com-
 “ plaint by Thomas Ross, defender, founded
 “ on an allegation that the pursuer, John Bal-
 “ lentine, contrary to the provisions of the

BALLENTINE

^{v.}
ROSS.


“ statute of the 29th of George III. chap. 68.
“ §. 93. had had pernicious ingredients with-
“ in his entered premises, did, at Ayr, on the
“ 15th of October 1818, pronounce a decree,
“ declaring that the pursuer had incurred a
“ forfeiture as for one penalty of L.100 ster-
“ ling for the foresaid offence, and decerning
“ against him for the same,

“ 1st, Whether the defender, well knowing
“ and being aware, that the said decree was for
“ a larger penalty than the penalty authorised
“ by the said statute, for the aforesaid offence,
“ did by himself, or those acting under his
“ authority, carry the said decree into execu-
“ tion, and did, in virtue of the same, upon
“ the 24th day of October 1818, cause the
“ Barr Miln, and the machinery thereof,
“ whereof the pursuer was the owner, or part
“ owner, with the snuff, or materials for
“ making snuff, in said mill, to be poinded,
“ to the damage and injury of the pursuer?

The following Issues were, 2d, “ Whether
“ the defender, well knowing,” &c. “ did
“ cause the pursuer to be apprehended and in-
“ carcerated in the jail of Irvine, in the county
“ of Ayr aforesaid, and there detained,” &c.
3d, Whether the decree was carried into ef-
fect, in whole, or in part, for the defender’s
behoof. 4th, “ Whether the defender, well

“knowing,” &c. handed over the decree to the Supervisor of Excise, or other officer, to be put in force, and whether the officer caused it to be enforced, &c. *5th*, Whether, contrary to the faith of an intimation given, the defender did, by himself, or others, execute the poinding within the time specified. *6th*, “Whether, after the intimation given by the defender, as aforesaid, the decree pronounced as aforesaid, was executed,” &c. *7th*, Whether “the defender, or those acting under his authority, did improperly and illegally exclude from, or refuse to admit into the mill,” snuff-work, to the loss, &c.

BALLENTINE

v.

ROSS.

The first evidence tendered for the pursuer was the notice of action.

Menzies and *M'Neill* object.—Proof of the notice is necessary under the statute 23. Geo. III. c. 70. §. 32; but it cannot be proved under these Issues. Our admissions do not prove it, as we do not admit it to be conform to the statute.

Jeffrey.—This being an objection to the regularity of the action under the statute, ought to have been taken in the Court of Session. The fact of the notice is admitted

In damages against an officer of Excise for wrongous imprisonment, the notice of action received in evidence at the trial.

BALLENTINE

v.
Ross.

in a representation and condescendence in the Court of Session.

LORD CHIEF COMMISSIONER.—By the argument for the defender, he appears to think that the pursuer is in a dilemma, and that he is not now entitled to prove notice, as it is not in the Issue; it is also said that the notice, if proved, is not conform to the statute.

It is a great comfort, that permanent injury is not done by any decision pronounced in the hurry of a trial; but in the present case, I feel no difficulty, and think there is no weight in the objection.

The doubt seems to arise from the statute being framed in reference to a Court differently constituted from this. The real meaning of this clause is, that a notice being necessary to entitle the party to come into Court, he must prove it, or be nonsuited. In this part of the island, there are two jurisdictions, the Court of Session and this Court. If notice was not given, this is a point of law which ought to have been stated in the Court of Session, or an application ought to have been made to the Jury Court to remit the case back to the Court of Ses-

sion, to decide on the regularity of the notice. The objection not having been taken in the Court of Session, I must try the Issues by the light to be thrown upon them by the evidence, and counsel on both sides must judge what they think necessary to elucidate the case. The objection is taken on the narrow ground that the notice is not mentioned in the Issue. I am not to decide whether it is necessary for the pursuer to produce evidence of the notice, or whether the notice is objectionable; but whatever evidence is necessary for the maintenance of the action, must be competent to elucidate the Issues. This evidence having been tendered by the pursuer, and he thinking it necessary to elucidate his case, I am of opinion that I cannot reject it on the ground stated.

BALLENTINE

v.

Ross.

In proof that notice had been given, the counsel for the pursuer wished to call upon the defender to produce a letter, and also wished to read from a representation given in for the defender.

A representation in the Court of Session, not evidence against a party; but answers to a condescendence are.

M'Neill.—The letter is not contained in the list of writings to be produced at the

BALLENTINE trial. The representation is not the best
v.
ROSS. evidence.



Jeffrey.—The proceedings in the Court of Session, though they may not prove a fact, still they prove that the party made the statements contained in them.

LORD CHIEF COMMISSIONER.—You are trying in this manner to help out a proof defective through your own negligence. I am by no means prepared to accede to the general proposition that every thing stated for the pursuer in his pleadings, is evidence against him, though I have no doubt that it would be so, if he had had an opportunity of seeing the statement before it was given into Court.

There is no doubt that the best evidence must be given, unless by the fault of the defender that evidence is wanting. But that cannot be said on the present occasion, as the pursuer has delayed till now to call for this document. In these circumstances, I cannot allow either the letter, or a statement signed by counsel, and which the party may not have seen, to be given in proof of the fact.

On a similar objection subsequently taken to the answers to the condescendence, his

Lordship observed, that they were in a different situation from the argumentative paper offered in proof of notice, as the condescendence and answers were the solemn averments on which the party rested his case.

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v.
ROSS

Cockburn opened the case, and stated, that the defender knew, and was told in Court, that the penalty was larger than the statute authorised. He also referred to Hutcheson's Justice of Peace, Vol. 3. p. 370, and to 12. Ch. II. c. 23. §. 31., and c. 24. §. 45.

M'Neill, for the defender.—The defender believed the decree a good one, and gave it over to the inferior officer; and if it was irregularly executed, the officer is the person liable; *Sinclair v. M'Farlane*, 19th Nov. 1770. Mor. 13,966. The only question is, for the imprisonment; and the defender offered, before the action, and is still ready, to pay L.50.

LORD CHIEF COMMISSIONER.—The policy of the revenue laws requires that officers should be protected in the execution of their duty. The liberty of the subject requires that the persons and property of the lieges shall be secured from wanton injury.

This was a complaint against the pursuer

BALLENTINE for an offence for which there is no doubt
^{v.}
ROSS. that L.50 is the penalty, though L.100 was
awarded.

This is purely a question for the Jury ; and it will probably be better to make a return upon each Issue, as that will shew the grounds on which the damages are given.

The two first Issues depend entirely on the opinion you form of the defender's knowledge of the proper penalty. On the 4th, it is said, the mill being heritable, could not be poinded. We are not here to determine this point of law ; but the fact appears clear, that the mill was taken possession of, and that the pursuer was imprisoned.

It is said that the judgment awarding the penalty was good, till set aside ; but when an officer gets notice that a judgment is erroneous, I cannot say that he ought not to hold his hand, until the judgment of the Superior Court has been got upon it.

On the 4th Issue, you will take into consideration the statement in the answers which I admitted as *prima facie* evidence ; for though I cannot state it to be as conclusive as a more solemn admission, still it is matter for your consideration, the defender not having brought any evidence against it. On these Issues,

therefore, if you are satisfied that he knew the judgment to be erroneous, and that he acted against his knowledge, you will give damages, and then the 3d Issue goes to enhance the damages.

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v.
ROSS.

This is an important question, as affecting the collection of the revenue, and the liberty of the subject. Damages ought never to be vindictive; and I will go farther, and say, that they ought not to be such as to encourage actions of this sort.

Verdict—"For the pursuer on the 1st, 2d, 3d, 4th, 5th, and 6th Issues. For the defender on the 7th. Damages L.150."

Jeffrey and Cockburn for the Pursuer.

M'Neill and Menzies for the Defender.

(Agents, *James Crawford*, w. s. and *D. Horne*, w. s.)

STOTHART
v.
SIR J. L.
JOHNSTONE'S
TRUSTEES.

DUMFRIES.

PRESENT,
LORD CHIEF COMMISSIONER.

1821.
Sept. 13.

STOTHART v. SIR J. L. JOHNSTONE'S
TRUSTEES.

Damages
against the
proprietor of a
mill, for not
implementing
his contract.

DAMAGES by a miller against his landlord, for not implementing the conditions of the lease, and causing legal diligence to be executed for the rent, when he, the landlord, had not implemented the contract.

DEFENCE.—The proprietor did all that was incumbent on him under the lease.

The Issues contained an admission that a mill and 20 acres of land were let to the pursuer, in terms of an offer by him, and of the conditions of set proposed by the late Sir J. Johnstone. The questions then were, 1st, Whether the 20 acres were to be adjoining the mill? and Whether the defenders failed to put the pursuer in possession, to his loss and damage? or Whether the pursuer agreed to

accept of 20 acres in the vicinity of the mill, as pointed out by Thomas Johnstone? and Whether he took possession of $13\frac{1}{2}$ acres, and two years after was offered $6\frac{1}{2}$ more, as pointed out by Thomas Johnstone? 2d, Whether the defender became bound to build a house at the mill, and to repair the others? and Whether he failed to put the pursuer in possession of the house for two years, and did not put the others in proper habitable condition? 3d and 4th Related to the thirlage of certain farms,—5th, As to injury to the mill-dam—and the 6th, 7th, and 8th, were, Whether in the years 1812, 1813, and 1814, the defender applied for, and obtained sequestration of the pursuer's crop and stock for the rent, although he had failed to implement his agreement with the pursuer.

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v.
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TRUSTEES.

Besides the action of damages, there was a declarator by the trustees, to have it found that they had implemented the contract, and that the tenant was bound to pay his rent.

The first piece of evidence offered for the pursuer, was an extract of the articles and conditions under which the mill and a number of farms were let.

An extract not received as evidence, the original writing being in Court,

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v.
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TRUSTEES.



Jeffrey, for the defenders, objected.—This is not sufficient to prove the tenor of the original, which is on the table.

Whigham.—An extract is evidence, and they do not say this is forged. If they wish for the original, they may produce it.—*Russel*, Form of Pro. p. 32.

LORD CHIEF COMMISSIONER.—This comes forward in a shape that is often extremely puzzling; but at present it appears to be a struggle to make the defenders produce the original.

In the Court of Session, an extract is frequently used without the original; and there, from the frequent diets, they have an opportunity of correcting any error, by calling for the original; but here the diet being peremptory, the Court must decide at one sitting.

In the circumstances of this case, I lay down the strict rule, that the original being the best evidence, and being in the power of the party, it ought to be produced. It is said this is a production by the defenders, and ought to be given in evidence by them. This shews a desire on the part of the pursuer to withhold it; and as there may possibly be some error, it appears to me, that

receiving the extract would be admitting secondary evidence.

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JOHNSTONE'S
TRUSTEES.

A witness was called as a haver, to produce a writing.

The Court has power to allow a haver to produce a writing at the trial.

Jeffrey.—It ought to have been produced eight days ago. Act of Sed. 10th Feb. 1816, § 3. and 9th July 1817, § 1.

LORD CHIEF COMMISSIONER.—There is an exception near the end of the 5th section of the act last mentioned, under which this is competent.

A witness was called to prove the handwriting of another person whose name was in the list of witnesses, but who could not attend.

Jeffrey objects.—This is not the best evidence. If the witness is ill, they ought to have examined him on commission.

Whigham.—We attempted to bring the best.

LORD CHIEF COMMISSIONER.—It is incompetent to admit the evidence of an absent person, even on a certificate on soul and conscience that he is unable to attend. The rule is, that the testimony must be given in presence of the Court and Jury; and the ex-

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SIR J. L.
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TRUSTEES.

ceptions are permanent infirmity, or being beyond the jurisdiction of the Court. I do not say that no relaxation of this rule has taken place; but it is our determination to bring it back to this. If you mean to prove facts by this witness, you ought to have moved to put off the trial; but at present I am only to decide on the legality of the question put; and can it be disputed that his hand-writing is a legal matter of proof? I am not at present to say whether this paper, after it is proved, is to be admitted in evidence.

Circumstances in which parol evidence was admitted, although a bargain was in writing.

A witness called for the pursuer was asked, on his cross-examination, whether he had any conversation with the pursuer as to the bargain.

Whigham.—The bargain was reduced to writing; and they are not entitled to bring parol evidence; Ersk. 4, 2, 19; Kendal and Co. v. Campbell, 18th June 1766, and Maxwell v. Burgess, 28th Jan. 1773; Mor. 12,351; Clark and Callender (in this Court); Philipps, 423 (2d edit.), (554, 5th edit.)

Jeffrey.—This is competent by the frame of the Issues, to explain the meaning of flexible terms. Geddes v. Wallace, Bottle, and Company.

This writing is not sufficient of itself, but requires possession to perfect it.

Whigham.—The Issues do not prescribe the means of proof. Even the payment of money cannot be proved in this manner; nor can an arbiter be called to explain his decree. This writing is the foundation of their action, and of their applications to the Sheriff, and must be good or bad *in toto*.

LORD CHIEF COMMISSIONER.—This having arisen on cross-examination, does not vary the nature of the question, as the only deviation from the rules of examination in chief is, that you may lead in cross-examining.

The last objection has been very ably and lucidly argued; but I wish to lay it out of view, as it rests on a technical objection; and when I have a general principle to go upon, I wish to avoid deciding on technical objections.

The question is, Did any thing pass between Stothart and you as to receiving of 20 acres? and if it goes to contradict the contract, it will be difficult to receive it. But in a case sent in circumstances like the present, and resulting from such proceedings, it is clear that facts and circumstances must be admitted

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in evidence to explain the agreement between the parties.

At present I throw out of view the meaning of the term adjoining. After I have heard the evidence, I shall be better able to direct the Jury whether they are to throw it out of view or not.

The question in issue is, whether it was *understood and agreed*; and how is it possible to make that out, except by proving the transactions of the parties. In order to shew the original transactions of the parties, I think the question may be put, and that the investigation may be so conducted as to shew this without admitting incompetent matter.

It was then objected by the pursuer that the witness was incompetent.

LORD CHIEF COMMISSIONER.—You waive all personal objection to the witness by calling him.

At an after stage of the proceeding, it was proposed to pass from any claim on one point.

LORD CHIEF COMMISSIONER.—This must be so arranged, that it can never again be brought to trial, which might be done by an agreement to submit it.

When Mr Hamilton, the former commissioner of Sir J. L. Johnstone, was called,

Whigham.—He is inadmissible, as at the time of this transaction he was commissioner, and almost sole agent for Sir John. Reid and Gardyne, 10th July 1813; *M'Alpine v. M'Alpine*, 2d Dec. 1806, M. App. Wit. No. 4.

Forsyth.—He is not agent in this cause, and has no interest to support either side.

LORD CHIEF COMMISSIONER.—There is no doubt he is admissible. The affairs of life could not go on, if the parties to such transactions could not be examined.

A letter was then produced.

Whigham objects.—This was a previous communing, and cannot be brought to vary the contract. *Gordon v. Hughes*, 15th June 1815, reversed March 1819.

LORD CHIEF COMMISSIONER.—Since the question was first agitated, I have turned it much in my mind, and I am satisfied that I am right in admitting the evidence, and I shall therefore state it to the Jury. The whole fallacy of the argument consists in viewing this as what goes to the reduction of a deed, or at least to vary it.

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TRUSTEES.

A witness admitted who had been Commissioner for the defender at the date of the transaction to be proved.

In damages for breach of bargain, competent to produce a letter dated antecedent to the bargain.

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TRUSTEES.



The only question here, is a question of damage, not as to the validity of the contract; and as this is competent under the Issues, I think it ought to be admitted.

Whigham, in opening the case, and in reply, maintained, that the pursuer was entitled to 20 acres adjoining the mill, and that he had proved damage by not getting it.

Jeffrey, for the defender, maintained that there was no ground for damages, as the claim rested on a quibble on the word adjoining, which it was clear was not to be taken in its strict sense.

LORD CHIEF COMMISSIONER.—After more than 13 hours of your praiseworthy attention to this case, I am sorry that it will be necessary for me to detain you, by going somewhat into detail; but it is some consolation, that after seven years litigation, your verdict will be such as to put an end to this case; for it is the question of damages, not the declarator, that is before you.

There has been some discussion as to the admissibility of part of the evidence, on the ground that the contract, when finally settled, had been reduced into writing; but the ques-

tion here is not whether the contract was final or not, or probative or not; but what the conception of the party was of his right; and whether he has suffered damage. It is on the two first Issues that the weight of the case depends.

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The word adjoining, which is in the agreement, is introduced into the Issues; and it is said this word is to over-ride the offer by the pursuer, and that it means adhering to, and round about the mill; but it is important to observe, that up to the date of the summons for damages, this was not the construction put on it by the pursuer.

The question is, whether the miller took this as a transaction to be settled by Mr Johnstone, and whether he accepted of it as settled by him. Mr Johnstone is dead; and as in that situation it would have been competent to prove what he had said, so it was competent to prove his letter, and the word near is employed in that letter, to describe the situation of the ground.

You are to consider the letters and the conduct of the pursuer; and from these you are to draw the conclusion as to what was his understanding.

On the question as to the building the

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v.
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houses, I do not think you will go very deep into the pocket of the defender.

The question as to the thirlage appears to me a very minute one; and the evidence as to the injury to the dam, is in a very doubtful state.

Whether damages are due on account of the sequestrations, depends entirely on your opinion on the two first Issues. As the sequestrations are regular, the only claim is on account of using diligence for the whole, when it is said only part was due.

Verdict.—The Jury found L.10 damages on account of the pursuer not having been put in possession of the houses in reasonable time; L.10 on account of the insufficiency of the houses; and L.5 for the injury to the mill dam. They also found that he had not been put in possession of the thirlage of certain farms; and found on the other Issues for the defenders.

Whigham for the Pursuer.

Forsyth and *Jeffrey* for the Defenders.

(Agents, *T. Johnstone*, w. s. and *Dallas* and *Innes*, w. s.)

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v.
SIR J. L.
JOHNSTONE'S
TRUSTEES.
1822.
December 3.

There had been an order given for expences in this case, and the accounts were taxed by the auditor.

LORD CHIEF COMMISSIONER.—In this case there were two actions, and Issues upon each went to trial. Both parties were actors, and both have been in part successful. The one party has succeeded in the declarator, and the other has partly succeeded in the action of damages.

When one party brings another into Court, and that party is unsuccessful, having caused the expence, he is bound to pay it. Thus, if the tenant had brought his action alone, he would have got his expences; or if the landlord had brought his declarator, he would have got his. * This is the natural *prima facie* rule, though it may be altered by circumstances. We can only lay down the principle, and must remit to the auditor, to separate the expence according to that principle.

This day a motion was made that decree should go out in name of the agent, for the balance of the accounts of expences. This

1823.
May 14. & 23.

In conjoined actions in which each party got expences, decree in name of the agent granted only for the balance of the two accounts.

STOTHART
v.
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TRUSTEES.

was opposed by the counsel for the tenant, who maintained that each agent was entitled to decree for the amount of his account, and reference was made to 2 Bell Com. 112, and to Smith and Gemmel, 9th July 1802. M. 6257.

LORD CHIEF COMMISSIONER.—This case was stated to me when sitting alone; and as it appeared to me to involve a principle of very considerable importance, I wish it to be fully stated now, when the Court is full.

Cockburn.—The simple question is, whether the agent is entitled to decree. There is no doubt that the practice is in our favour. Mr Bell is mistaken in saying that the right is to an assignation merely; the expences belong to the agent. The Court held in Smith and Gemmel, that bankruptcy was what raised the right of the agent. A private settlement by the parties does not cut off the right.—*Bryson v. Hamilton*, 17th June 1813—*Rox v. Stewart*, 3d July 1818.

Jeffrey.—We admit the authorities and principles, and that a party is not entitled to plead compensation on a separate debt. But the specialty here is, that this is the same case. Agents may, on the principle con-

tended for, advance money, in the hope of recovering it from the opposite party, which ought not to be encouraged.

M'CRACKEN,
&c.
v.
PEARSON.

LORD CHIEF COMMISSIONER.—We should be extremely sorry were we called on to decide upon a technical rule, in opposition to the justice of the case; but here the technical rule is got quit of. Here there is a case with six Issues, and three are found for, and three against the party applying; and he has, on the whole, lost instead of gaining. The order must be for the balance of the accounts.

LORDS PITMILLY and GILLIES expressed their concurrence in opinion that the order should be for the balance.

DUMFRIES.

PRESENT,
LORD CHIEF COMMISSIONER.

M'CRACKEN, &c. v. PEARSON.

REDUCTION on the ground of death-bed.

1821.
September 14.

Deathbed.—
Found that at the date of a deed under reduction, the granter was ill of the disease of which he died; but that he went to, and returned from, the public market unsupported.

M'CRACKEN,
&c.

v.

PEARSON.

ISSUES.

“ It being admitted, that on the 27th day of
“ December 1819, the late Robert M'Cracken
“ subscribed the disposition and deed of set-
“ tlement in process, in favour of the defend-
“ ers, Robert Jackson, William M'Kie,
“ James Young, and John Kerr, bearing
“ date the said 27th December. It being
“ also admitted, that the said Robert M'Crac-
“ ken died on the 28th day of the said month
“ of December,

“ Whether, at the time the said Robert
“ M'Cracken subscribed the said deed, he had
“ contracted the disease of which he died? or,

“ Whether, on the said 27th day of De-
“ cember, and after subscribing the said deed,
“ the said Robert M'Cracken went to the
“ public market of the town of Dumfries,
“ and returned from the same: And Whe-
“ ther, upon the said occasion, the said Ro-
“ bert M'Cracken was supported?”

Dr Maxwell, a witness for the pursuer,
having stated that he had been informed
that the late Mr M'Cracken was ill,

Forsyth, for the defender, objects.—This is hearsay.

M'CRACKEN,
&c.

v.
PEARSON.

LORD CHIEF COMMISSIONER.—They cannot ask this to prove the fact of the illness; but it is competent in reference to the opinion given by the witness.

Another witness was asked as to the regulation of the market days in Dumfries.

Parol evidence incompetent to prove regulations which have been reduced into writing.

LORD CHIEF COMMISSIONER.—Was that regulation reduced into writing? You may cross-examine him to this, in order to try the truth of his memory; but if it was reduced into writing, and if the evidence is tendered for the purpose of constituting a right, I can only take it from the writing.

Marshall opened the case for the pursuer, and stated the grounds of the reduction, and that the exception founded on in this case was, that the deceased went to market. But this was on a Monday; and there is an act of Charles II. prohibiting markets on Monday.

Forsyth, for the defender, stated—The act of Charles only prohibits large markets. The Act Sed. 17th February 1682, shews the meaning of the law. It is said there

MCRAKEN,
 &c.
 v.
 PEARSON.

must be a grant of market ; consuetude makes law in burgh, and every day is a market for fish in Dumfries.

The meaning of the law of death-bed is, that the person should go to a place of common resort for buying and selling.—Ersk. B. 3. T. 8. § 96.

This person cannot be said to have been on death-bed, as he was ill of the same disease for twenty years.

Jeffrey.—In this case there is no dispute about the facts proved, and it is for you to draw a conclusion from them, or, if you prefer it, to return a special verdict. The only question is, what you are to find as to this person being at *market* and *unsupported*. Buying and selling in the open air is not enough to constitute a market. It must be on a day, and at an hour, when ordinary dealers are entitled to sell within the burgh ; and it is in evidence that Wednesday and Friday are the market-days in Dumfries.

In this case he went, in presence of picked witnesses, and was supported in the sense of law. He had a stick, and sat in the shop.—Stair, B. 4. T. 20. § 46.

LORD CHIEF COMMISSIONER.—(*To the Bar.*)—The questions of whether this was a

market, and whether sitting in a shop is support in a question of death-bed, are pure questions of law. If this is to go to the Jury, I must direct them in point of law; and they will apply the facts to the law, as stated; or if the Bar prefer it, the Jury may find a special verdict; and with that view I have noted the facts as a scheme of a special verdict, and shall read to the Jury the evidence applicable to each.

McCRACKEN,
&c.
v.
PEARSON.

If I give the direction in point of law, then a Bill of Exceptions can be tendered to the law I state; and in this case, the only inconvenience is, that it forces one party to move the question. If a special verdict is found, the case will go back to the Court of Session to decide the law.

Though I think there would have been much weight in the argument urged by Mr Jeffrey, had it been soon after the time of Lord Stair, yet I find there are two cases which would lead me to state, that in this case the person went to market, and unsupported. The cases are referred to in a case tried in this Court; and in the last we have the opinion and decision of Lord Kames.—Patterson's Trustees, Vol. I. p. 76.—Earl of Roseberry, &c. v. Ladies M. and D. Primrose,

M'CRACKEN,
&c.
v.
PEARSON.

24th Nov. 1736, M. 3322; Laird v. Kirkwood, 9th July 1763, M. 3315.

I do not, by this statement, wish to create any impression as to the decision of the question; and I am aware of the force of Mr Jeffrey's argument; but with these two cases presented to me, I cannot advise the Jury to find for the pursuer.

On the question of support, it appears that he was not supported by any person; and the support relied on I do not consider sufficient to warrant a verdict for the pursuer.

But if the Bar wish it, I shall state the facts to the Jury, in order that they may find a special verdict.

The Bar on both sides thanked his Lordship; but stated, that they were not in a situation to make impartial suggestions, as each would of course advise what they thought most for the benefit of their own client; and they therefore left it entirely to his Lordship.

LORD CHIEF COMMISSIONER.—(*To the Jury.*)—You have heard what has passed; and as the least expensive and most expeditious method of having this question discussed, I think you ought to find, That this person was under the disease of which he died.

On the other part of the case, my opinion

is, that he did go to the public market of Dumfries. You must therefore find that he did go to, and return from, the market, if you are satisfied of the fact that he went and returned in the manner described.

M'CRACKEN,
&c.
v.
PEARSON.

With regard to the support, the evidence, I think, is, that he was not supported by any person, but that he used a stick, which he was accustomed to do. Sitting down differs as to the effect to be given to it, when a person goes on purpose to render his settlement valid. But though this was the purpose in the present case, yet, on my view of the law at present, his sitting down is not such as amounts to support, in the meaning of the law of death-bed.

Verdict—"For the pursuers on the first Issue, and for the defender on the second Issue, in both its branches."

Jeffrey and Marshall for the Pursuers.

Forsyth and J. Henderson for the Defender.

(Agents, *James H. Ross, w. s.* and *John Thorburn, w. E.*)

HARKNESS
v.
HARKNESS.

DUMFRIES.

PRESENT,
LORD CHIEF COMMISSIONER.

1821.
September 14.

HARKNESS v. HARKNESS.

Found that a deed was truly dated—that one party was of sound mind, and not labouring under the disease of which he died; but that the subscription of the other party was not genuine.

REDUCTION of a postnuptial contract of marriage.

ISSUES.

“ 1st, Whether the deed in process, bearing to be a postnuptial contract of marriage between the late John Harkness in Burnside of Poolmuir, and the defender, Janet Burgess, or Harkness, and bearing to be dated the 12th day of January 1811, was subscribed by the said John Harkness on the said 12th day of January, or on or about the 12th day of February 1811, or upon a day subsequent to the 5th day of the said month of February, and within 60 days of his death, which is admitted to have taken

“ place on the 5th day of April of the said
“ year ?

HARKNESS

v.

HARKNESS.


“ 2d, Whether, at the time of signing the
“ said deed, the said John Harkness had con-
“ tracted and was labouring under the dis-
“ ease of which he afterwards died ?

“ 3d, Whether the name of Janet Burgess,
“ the defender, subscribed to the said deed, is
“ the true and genuine subscription and pro-
“ per hand-writing of the said defender ; or
“ Whether the hand of the said defender was
“ led or directed when she made the said sub-
“ scription ?

“ 4th, Whether at the time the said John
“ Harkness subscribed the said deed, he was
“ of a sound and disposing mind, and capable
“ of understanding his affairs ?”

Whigham opened the case for the pursuer,
and admitted, that when regularly executed,
a deed was the best evidence of its own date,
and that for a long period it was incompetent
to examine the instrumentary witnesses, but
since 1793, that point has not been mooted.

Forsyth, for the defender.—This is a most
important question ; whether a solemn deed
is to be cut down on the faith of the slippery
memory of witnesses.

HARKNESS
v.
HARKNESS.


Jeffrey.—This is decided against the defender.

LORD CHIEF COMMISSIONER.—The only thing the Jury or I have to do with, are the facts; and you have only to apply yourself to the proof of these facts.

Fersyth.—It is said the hand was led; but there is only one witness to this, and he an instrumentary witness, which is incompetent: 1540. c. 117, and 1681. c. 5. An instrumentary witness may now be examined, but his credit is brought in question. *Frank v. Frank*, 3d March 1795, M. 16,824, Aff. 10th June 1809; *Falconer v. Arbuthnot*, 23d June 1750, M. 16,759; *Bell, Test. Deeds*, p. 101; *Setton v. Setton's Trustees*, Vol. I. p. 9.

Jeffrey.—There are here substantially only two questions, Whether this person's hand was led? and Whether the deed was signed on 12th January. It is said an instrumentary witness swearing against his subscription, is infamous; that is a fit point for the honest mind of a Jury.

LORD CHIEF COMMISSIONER.—This is a most important question in many points of view, and requires minute attention. There is no doubt, that since the case referred to,

instrumentary witnesses may be examined; but their evidence must be narrowly examined, and weighed in the nicest scales. This observation applies to a great part of the case; and keeping this in view, and that we have nothing to do with the law of the case, we must consider the Issues. The question in the first is, Whether this deed was signed of the date it bears? and if you are of opinion that it was, it will take the case out of the law of death-bed, and render it unnecessary to find on the second.

HARKNESS

v.

HARKNESS.

This date is impeached, on the evidence of the instrumentary witness; but are you to take his loose testimony, that he does not *think* the deed was signed on that day, (especially when he does not mention any other) to cut down a deed, the veracity of which he certified by his signature? Are you to believe the fact correctly done; or are you, on such evidence, to set aside a solemn instrument protected by the legislature?

On the second Issue, the evidence also appears to me too loose to be rested on; but if you go along with me on the first, it is not necessary to make a return on this.

The fourth Issue Mr Jeffrey has most properly given up; but upon the third, the evi-

HARKNESS

v.
HARKNESS.

dence will require your most particular attention, to ascertain whether this was her genuine subscription, or if her hand was led.

This woman is stated by the witnesses to be a person not in the habit of writing,—that on one occasion she attempted to write, but could not ; and that on more than one solemn occasion, she said she could not write ; and this is evidence, independent of the instrumentary witness.

If you are of opinion that the instrumentary witness is confirmed by concomitant circumstances, you must find accordingly ; but if there is doubt, you must rest on the solemn deed. In this case, I do not think the evidence can be rejected as that of a single witness, there being facts and circumstances in support of it. It is in evidence that this woman since wrote her name ; and it is stated, that this was given to the agent for the defender ; and that if now produced, it would shew that this is not her writing. You will consider this, and give it due weight. On the others I have expressed a clear opinion ; but that is not to controul you, as you are to find according to your view of the evidence.

Verdict.—“ The Jury found that the deed

“ was executed on the 12th January : That
 “ John Harkness was not then labouring under
 “ the disease of which he died : That the
 “ name Janet Burgess was not her true sub-
 “ scription; and That Harkness was of a sound
 “ and disposing mind,” &c.

MARQUIS OF
 TWEEDDALE
 v.
 BROWN.

Jeffrey and Whigham for the Pursuer.

Forsyth for the Defender.

(Agents, *Archibald Crawford*, w. s. and *James Smail*, w. s.)

JEDBURGH.

PRESENT,
 LORD CHIEF COMMISSIONER.

MARQUIS OF TWEEDDALE v. BROWN.

1821.
 Sept. 18.

AN action of damages against a tenant, for ploughing during the last year of his lease, more of his farm than he was entitled to have under corn crop.

Damages
 against a te-
 nant, for mis-
 management of
 his farm.

DEFENCE.—A denial of having done any thing during the occupation of his farm, which entitles the pursuer to damages.

MARQUIS OF
TWERDDALE

v.
BROWN.



ISSUES.

“ It being admitted, that the farm of Tullishill, consisting of 3000 acres or thereabouts, the property of the pursuer, was held by the defender, under lease and decree-arbitral in process, up to the term of Whitsunday 1819, as to the houses and grass, and to the separation of that year’s crop from the ground, as to the arable land,

“ 1st, Whether the said farm was a pasture or stock farm, with the exception of from 60 or 70 acres, or thereabouts, usually kept in tillage?

“ 2d, Whether the defender, in the last year of his possession of the said farm, contrary to the rules of good husbandry, and the custom of the country upon such farms, did, besides the aforesaid 60 or 70 acres, plough up from 90 to 100 acres, or thereabouts, in different parts of the farm, and in situations injurious to the future cultivation of the farm as a stock farm, to the loss and damage of the said pursuer?

“ 3d, Whether the defender, contrary to the rules of good husbandry, and the custom of the country in such cases, ploughed

“ up the whole or any part of the said 90 or
 “ 100 acres, without having previously fold-
 “ ed, limed, or dunged the same, to the loss
 “ and damage of the said pursuer ?

MARQUIS OF
 TWEEDDALE
 v.
 BROWN.

“ 4th, Whether in the last year of his pos-
 “ session of the said farm, the said defender,
 “ contrary to the rules of good husbandry,
 “ and the custom of the country in such
 “ cases, did take a white crop from a part of
 “ the arable land in the said farm, which had
 “ borne a white crop the preceding year, to
 “ the damage and injury of the said pur-
 “ suer ?

“ Damages claimed L.2000.”

After calling several witnesses, the pursuer gave in evidence a report by Mr Tait, under a remit from the Lord Ordinary.

A report made under a remit from a Lord Ordinary not evidence.

LORD CHIEF COMMISSIONER.—If this report is founded on information given by others, it is not evidence ; but in so far as Mr Tait’s opinion is founded on personal inspection, and is now confirmed by him on oath, I do not object to it.

A witness was called to prove a dispute similar to the present, and a decision by arbiters on the subject, and that the tenant was

A decision by an arbiter, in a case not proved to be similar, or the practice on a particular farm, not evidence of the custom of the country.

MARQUIS OF
TWEEDDALE

v.

BROWN.



paid for not ploughing part of his farm, the last year of his lease.

Moncreiff—Objects.

LORD CHIEF COMMISSIONER.—If they prove that the lease was an open one, and that the discussion was as to the custom of the country, this would be evidence; but unless this is done, it is not competent.

When another witness was called, and asked what proportion of his farm he ploughed during the last year of his lease,

LORD CHIEF COMMISSIONER.—I am unwilling to interfere when no objection is taken; but really you ought to lay a foundation, by proving that there was a discussion as to the custom of the country. It is that which makes the testimony of any use, and unless you prove this, the presumption will be, that it was the agreement of the parties which regulated the matter.

Cockburn opened the case, and stated the origin of the action, and that the Issues here were special, and to go back to the Court of Session; and that the amount of the damage was the only question of any difficulty.

Jeffrey.—The only damage done must be

to the incoming tenant; and we have a letter from him, relieving us from damages.

MARQUIS OF
TWEEDDALE
v.
BROWN.

LORD CHIEF COMMISSIONER.—How do you shew the privity of the Marquis to this?

Jeffrey.—It is only through the tenant that he can suffer damage. The present action is not to fix what is good husbandry, or the wisdom of the custom; but the fact of what the custom is. By the custom, the defender might have ploughed twice as much as he did. The only possible expence from being detached is, that an additional herd must be kept; and yet a witness estimates the damage at L.400.

The custom as to two white crops, is more than proved.

Moncreiff.—It is said there ought to be favour to the defender; but though that is the rule in a claim for an injury to the feelings of the pursuer, it has no place in the present case, which is an injury done to the property of one, for the emolument of another. The pursuer did not bring the proper evidence of the custom of the country. Instead of proving that in particular instances a larger proportion was ploughed, he ought to have brought persons skilled in the general practice; *Brodie v. Murdoch*, 7th Feb. 1777.—M. App. Tack,

MARQUIS OF
TWEEDDALE
v.
BROWN.

No. 3.—In this case, though there was permission to plough, the tenant was found not entitled to a way going crop.

LORD CHIEF COMMISSIONER.—It is a great satisfaction to a Judge to know that a question of this nature is submitted not only to an intelligent Jury, but to those who have greater experience in the practice of this part of the kingdom than he has. I shall therefore state results, rather than go into detail on the different Issues.

On the first Issue, it is admitted that this is a stock farm, and the first question is the extent of the cultivation upon it.

This is merely a preliminary question ; and it is on the three following Issues that the damages depend. There is some contrariety of evidence as to the quantity, but it was from 60 to 90 acres in different parts of the farm ; and the pursuer must make out that this was contrary both to the rules of good husbandry and the custom of the country.

On the evidence for the pursuer, it appears to me that there is a *prima facie* case made out, that it was contrary, &c.

In the third Issue, the term previously, according to my view, must mean the year preceding ; and if you take it in that view, I

conceive you must find for the pursuer, as there is no proof of folding or dunging at any time; and the evidence as to liming does not apply to that year.

MARQUIS OF
TWEEDDALE.

v.

BROWN.



On the fourth Issue, there can be no doubt of the fact of two white crops having been taken; but some of the witnesses, even for the pursuer, approve, and others disapprove of this.

You will consider attentively the evidence as to the quantity of ground the defender might plough according to the custom of the country. Four of the witnesses are to be thrown out of view, as they did not speak to open leases; five others spoke to other matters, and ten to the custom, only one of them having mentioned the rules of good husbandry.

Custom is to be proved, not by witnesses speaking in general to what they consider the custom, but is to be made out by several individual and unconnected instances, free from any agreement of the parties.

If you find for the pursuer on all the Issues, you will then fix the amount of the damages; if for the defender, then no damages; if partly for the pursuer, and partly for the defender, then of course you will modify the

MARQUIS OF
TWEEDDALE.

v.

BROWN.

damages. I agree, that in a case of this nature, or of money withheld, the pursuer is bound to prove loss; but I do not think he is bound to fix it in pounds, shillings, and pence. I cannot agree with the counsel for the defender that no damage is proved; for it has not been proved that the rent of the incoming tenant was fixed before this ploughing took place, and even this goes to the deterioration of the soil. If the rent was so fixed, there is no evidence that he has not since got an abatement. How you are to discover the amount, is a different question; and I have no hesitation in saying, that I think it would not be proper, without considering the circumstances of the case, to give L.400, which is the only sum we have had proved. If part of the Issues are found for the defender, this will of course diminish the sum.

Verdict.—“ Finding upon the first Issue,
“ that the farm of Tullishill was a pasture
“ farm, or stock farm; and find upon all the
“ Issues, a verdict for the defender.”

Moncreiff and Cockburn for the Pursuer.

Jeffrey and Cunningham for the Defender.

(Agents, Gibson, Christie, and Wardlaw, w. s. and James Hay,
w. s.)

MARQUIS OF
TWEEDDALE

v.

KERR.

JEDBURGH.

PRESENT,
LORD CHIEF COMMISSIONER.

MARQUIS OF TWEEDDALE, v. KERR.

1821.
September 19.

A DECLARATOR to have it found that the old channel of a river is the march between two neighbouring proprietors; and that about three acres of ground, situate between the old and new channel, belong to the pursuer.

Finding as to the change of the course of a river, dividing two properties.

DEFENCE.—Possession beyond the memory of man.

ISSUES,

“ 1st, Whether the water of Kail, admitted
“ to have been originally the march between
“ the lands of Grubbet, the property of the
“ pursuer, and the lands of Gateshaw, the pro-
“ perty of the defender, did, at a period with-
“ in 40 years prior to 23d December 1819,
“ run in nearly a straight direction from a

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TWEEDDALE

v.

KERR.



“ point marked A on the plan, near a place
“ called Rushie-hole, or Rush-pool, to another
“ point marked B on the plan, near a place
“ called Ubats-haugh?”

“ 2d, Whether, within the period afore-
“ said, the course of the said water has shift-
“ ed to the eastward, whereby three acres, or
“ thereabouts, of the lands of Grubbet, for-
“ merly situated on the east side, are now si-
“ tuated on the west side of the said water?”

“ 3d, Whether the said three acres of land,
“ situated betwixt the former and present
“ course of the said water of Kail, have been
“ possessed continually, since the course of the
“ said water was changed as aforesaid, by the
“ pursuer or his tenants, by pasturing their
“ cattle and driving their carts thereon?”

“ 4th, Whether the said change was partly
“ produced by the improper operations of Wil-
“ liam Kerr, the brother of the pursuer, by
“ putting stones, about 25 years ago, into the
“ bed of the said river?—Or,

“ 5th, Whether the change that may have
“ taken place, has been by the imperceptible
“ addition of soil to the bank of the river on
“ the defender’s side?”

On an Issue as
to an act done
by one indivi-
dual, the

Court will not

allow evidence as to another, for the purpose of having the fact indorsed.

In the course of the evidence, a question

was put, Whether Gilbert Kerr placed stones in the river?

MARQUIS OF
TWEEDDALE

v.

KERR.



Cockburn, for the defender, objects.—Both William and Gilbert possessed, and we were prepared with evidence to meet the operations of William.

Jeffrey, for the pursuer.—The fact of putting in stones was the only thing they had to meet; and there is no fair ground of objection, if their predecessor put them in.

LORD CHIEF COMMISSIONER.—The ninth section of the Act 59. Geo. III. c. 35., was intended to prevent parties from losing the benefit of facts of great importance, which might come out in the course of the evidence.

This occurred in Lord Fife's case (See Vol. I. p. 110.), where, in the course of the evidence, a fact came out as to his acknowledgment of the subscription, of such importance, that it might have decided the question. It was therefore thought of importance that the Court should have the power to indorse such facts; but this was never intended as a licence to prove facts of which the opposite party had no notice. This brings the case to the question, What is the

MARQUIS OF
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v.

KERR.



Issue? The Issues are drawn from the condescendence of the party; and in the preparation of them, the parties have frequent opportunities of making corrections. In the Issues so prepared, the name of *William Kerr* stands; and I am of opinion it cannot be altered. It is clear, then, that I can only admit this evidence on the ground that the question is, Whether stones were put by any body? At first the averment stood, that the stones were put in 25 years ago; and if the Issue had been in these terms, the evidence would have been admissible; but by stating a name, the pursuer may have thrown the other party off his guard, and led him to inquire only as to William. I am therefore of opinion, that a specific question being put as to a particular person, that question cannot be generalized, and that allowing this would tend to injustice and surprise.

If I am wrong, the mode of redress is by Bill of Exceptions on the terms of the Issue, and my judgment rejecting the evidence.

A tenant of a farm not admitted to prove the boundary of the farm.

A witness having stated, that if the pursuer succeeded, the ground would form part of his, the witness's farm,

Cockburn objects—He has an interest ; and if there is any point fixed, it is that interest disqualifies.

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TWEEDDALE
v.
KERR.

Moncreiff.—It is hard to be deprived of the best evidence (as he and his father lived upon the spot), for so inconsiderable an interest ; and it is not clear that he would not have to pay additional rent.


LORD CHIEF COMMISSIONER.—It seems admitted that he has an interest ; and if he has an interest, the amount is of no consequence, and cannot be answered by the usefulness of the evidence.

Moncreiff opened the case, and stated the facts, and maintained that the defender must prove the change to have been imperceptible. The pursuer will prove that it was perceptible, or at least that the river having changed from one line to another, the change must have been perceptible.

Cockburn, for the defender.—We admit that the river formerly ran in nearly a straight direction ; and it is proved that a quantity of land is situate between that line and the present course of the river.

If a river changes its course by a sudden burst, or by a visible lump being torn from

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the bank and carried to the opposite side, the ground may be followed. But if the change is by gradual eating from the one side, which all rivers are doing every moment, the proprietor is not, either in law or reason, entitled to follow the ground.

On the third Issue their proof is against them, and on the fourth they have led no evidence.

The last is the great subject in dispute ; and it is said imperceptible is not a proper term ; but we could not find a better. By using that term, it was not the intention to enquire whether the change was such as could not have been discovered by a microscope ; but whether, in common sense, the detrition on one side, and the addition to the other, was perceptible. The witnesses state, that this change was not produced by a sudden burst, or avulsion, or artificial operation ; and therefore it could only be in the manner we state.

LORD CHIEF COMMISSIONER.—The counsel for the defender has relieved us from trouble on the two first Issues ; and on them you may find generally, unless you think any thing special has been proved. The third Is-

sue affords subject of consideration, and, under the terms of it, the pursuer was bound to prove that he pastured the ground, and drove carts on it continually. The evidence is in your recollection; and the material fact is, that the defender's cattle pastured this ground, and that he turned off the cattle of the pursuer's tenant. As to carts, there is no proof of any being driven, but there is some proof as to the appearance of tracks.

MARQUIS OF
TWEEDDALE.

^{n.}
KERR.


On the 4th Issue you must find for the defender, as the pursuer has failed to prove what he undertook, and it is of no consequence whether that arises from the evidence being in law inadmissible, or from his having made an improper statement.

It is vain at this period to regret the term used in the 5th Issue, as it cannot now be altered. In the language of law, this is termed alluvion, and the difficulty was to find a proper translation of this term.

The term imperceptible cannot be strictly and critically applied to this; but I think you are entitled to take it in a general sense, and to hold that the addition was imperceptible, unless the contrary has been proved. Is there then any proof of avulsion, of a tearing away? In considering whether it could have

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been by imperceptible addition, you will keep in mind the period of time within which this took place, and whether this does not afford a presumption that it was by more sudden tearing? On the other hand, you have a witness proving that this was by gradual wearing; and if this is sufficient to satisfy you, then I think you are safe to find that this ground was formed by gradual and imperceptible additions.

If you return a verdict of this sort, there is no harm in stating that there was no imperceptible addition of soil, but that there has been a gradual wearing away of the opposite bank.

Verdict.—“ The Jury found on the first
“ and second Issues for the pursuer; on the
“ third, that the three acres of ground have
“ never been possessed since the change of
“ the river, by the pursuer or his tenants, by
“ pasturing, &c.; on the fourth Issue for the
“ defender; and on the fifth, that the change
“ of the river has been gradual and imper-
“ ceptible.”

Moncreiff and Jeffrey for the Pursuer.

Cockburn for the Defender.

(Agents, *Gibson, Christie, and Wardlaw, w. s. and Brodie and Imlach.*)

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v.
LIDDLE.

PRESENT,
LORDS CHIEF COMMISSIONER AND GILLIES.

SIMPSON v. LIDDLE.

1821.
December 3.

DAMAGES assessed for wrongous imprisonment.

Damages assessed for apprehending and imprisoning the pursuer by diligence on a bill.

DEFENCE.—The diligence was legal, and no improper use was made of it.

ISSUE.

“ It having been decided by interlocutor of
“ the Court of Session, bearing date 6th July
“ 1819, and now final in that Court, That the
“ defender was not entitled to do personal di-
“ ligence against the pursuer, on a certain bill
“ of exchange, produced in process, for L.630,
“ dated the 17th June 1815, payable on the
“ 17th day of February 1816; drawn by the
“ defender upon the pursuer and one Thomas
“ Mowat, and by them accepted; and that
“ the said defender is liable in damages to the
“ pursuer, for having done diligence thereon,

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v.
LIDDLE.

“ What loss and damage has been suffered by
 “ the pursuer, in consequence of the defender
 “ having caused him to be apprehended and
 “ imprisoned in the jail of Lanark, on the
 “ 19th day of June 1817; and therein de-
 “ tained until the 23d or 24th day of the said
 “ month, in virtue of letters of caption, raised
 “ upon the said bill of exchange, at the in-
 “ stance of the said defender ?

“ Damages laid at L.1000.”

The pursuer, along with Thomas Mowat, accepted a bill for L.630, drawn by the defender. The defender afterwards agreed to purchase a property belonging to Mowat, and to hold the L.630 as part of the price. Some delay occurred in making out the conveyance by Mowat ; and the defender raised diligence on the bill, and incarcerated the pursuer.

In damages for
 illegal impri-
 sonment, in-
 competent to
 prove the cha-
 racter of the
 defender.

A witness called for the defender was asked, whether he, the defender, was a harsh man ?

LORD CHIEF COMMISSIONER.—I very much doubt if this is evidence, as we are here trying the question as to the act done, not as to the character of the man.

Another witness being called to the same point,

LORD CHIEF COMMISSIONER.—I cannot sit here and allow incompetent evidence to be produced. If this was a prosecution for a criminal act, the character of the defender would be in issue; but in the present case, the question is as to the act done, and to ascertain the damage; and how can the character of the defender aggravate or diminish the damages?

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LIDDLE.

Fullarton opened the case for the pursuer, and stated the origin of the case, the interlocutor of the Lord Ordinary, and that probably the defender used this as a means of compelling Mowat to proceed.

Baird, for the defender, admitted that the Jury must find damages, but contended that 1s. was too much, as Mowat was guilty of tergiversation.

When damages are found due by the Court of Session, incompetent to bring evidence in the Jury Court to prove that none were

LORD CHIEF COMMISSIONER.—In fact the Issue is the damage which arose from the imprisonment. The pursuer gave some evidence as to the transaction with Mowat; and so far as it goes in diminution of damages, it may be quite right in you to found on it. But if this is to go the length of overturning the interlocutor of the Court of Session, I ought to have stopped it sooner; for though you said you was not to impugn the judgment,

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LIDDLE.



yet the argument and evidence opened by you appears to me to impugn it. The judgment goes on the principle that the transaction with Mowat was *res inter alios*.

The Court, and not the Jury, decide whether nominal damages carry costs.

Baird.—I am entitled to state every circumstance in diminution or extinction of damages, as even nominal damages carry expenses.

LORD CHIEF COMMISSIONER.—That is not a question for the Jury, and therefore ought not to be stated by either party. There have been cases of nominal damages, where expenses have been given, but they are exceptions to the general rule.

Jeffrey, for the pursuer.—The matter stated on the other side is irrelevant. The defender had action against Mowat, to compel performance at the time he used diligence against the pursuer.

LORD CHIEF COMMISSIONER.—Evidence has been laid before you of the situation of the pursuer, and also of the temper of the defender. This last is not fit for your consideration, as the question is, what the pursuer has suffered; and this cannot be affected by the temper of the defender, whether it is harsh or the reverse. Much of the evidence for

the defender goes to shew, that what was done was necessary, and that it produced the effect of getting a conveyance to the property. That evidence, I conceive, goes to impeach the judgment of the Court of Session, and is not to be considered by you, but is put out of Court by the final interlocutor of that Court. We must hold that interlocutor as containing a finding that the defender having entered into the transaction with Mowat, a third person was no longer entitled to demand the amount of the bill from the pursuer.

In every case, it is usual to claim, as damages, a much larger sum than is expected; and in this case Mr Jeffrey has limited his demand to L.500. Without wishing to take this question out of your hands, I mention it that you may not be misled; as, were you to give the sum now demanded, it would be very like what the law calls vindictive damages.

You will consider the actual loss suffered by the pursuer, which appears to me very trifling. The uneasiness of mind and public disgrace suffered, is the great question here. This must differ in the circumstances of every case, and the compensation ought to be considered with composure, and without being

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LIDDLE.



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inflamed by what may have been stated by counsel.

Verdict—"For the pursuer, damages L.100
"sterling."

Jeffrey and Fullarton, for the Pursuer.

Baird, for the Defender.

(Agents, *John Somerville, jun.* and *Thomas Russel.*)

PRESENT,

LORD CHIEF COMMISSIONER.

1821.
Dec. 5.

KITCHEN v. FISHER.

L.1676 found due by the master of a trading vessel, as damages and the value of a quantity of ivory.

AN action against the master of a vessel for the price of a quantity of ivory, and other goods said to have been sold by him on a voyage to Africa and the West Indies, and also for damages.

DEFENCE.—The allegation is false and injurious.

ISSUES.

"It being admitted that, in September

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“ 1806, the brig Rachel of Liverpool, of
“ which the pursuer is or was owner, and
“ John Blackburn was master, sailed from
“ Liverpool on a trading voyage to the coast
“ of Africa, and from thence to the West
“ Indies, and back to Liverpool; and that
“ the said John Blackburn having died in
“ the course of the voyage, the defender, then
“ first mate, succeeded to the command, and
“ took the management of the said vessel
“ and cargo,—and it being farther admitted,
“ that the said vessel arrived, under the de-
“ fender’s charge, as aforesaid, at the Island
“ of Princes, on the coast of Africa,—Whe-
“ ther the said defender did convey, or cause
“ to be conveyed, on shore, at the said island,
“ a quantity of rumalls, or of India and
“ Manchester goods, or gunpowder and stores,
“ a part of the cargo of said vessel, and the
“ property of the pursuer, for which the said
“ defender received value to the extent of
“ L.200, or thereabouts;—And, Whether
“ the said defender has failed to account for
“ the proceeds of said goods to the pursuer?

“ And it being admitted that the said ves-
“ sel afterwards proceeded on her voyage, and
“ arrived at Barbadoes, in the beginning of
“ the year 1807, and soon afterwards sailed

KITCHEN
v.
FISHER.

“ for Liverpool,—Whether the said defender,
“ having the command of said vessel, and
“ charge of her cargo, as aforesaid, during
“ her stay at said island, or upon her voyage
“ homewards, did convey, or cause to be con-
“ veyed, on board a vessel called the *Active*,
“ of which one Thomas Taylor was master,
“ a quantity of ivory, amounting to five
“ tons or thereabouts, the property of the
“ said pursuer, for the value of which he,
“ the said defender, never accounted to the
“ said pursuer?

“ Schedule of sums claimed by the pur-
“ suer :—L.2800, as the value of the ivory;
“ L.200, as the value of the goods disposed
“ of at the Island of Princes; together with
“ interest upon both of said sums respective-
“ ly. L.3000 of damages.

Incompetent
to prove by pa-
rol evidence,
written in-
structions to
the masters of
trading vessels.

The first witness having stated that the officers of vessels sailing to Africa, were forbidden to trade on their own account; and that a receipt was usually taken from them, containing an obligation to that effect,

LORD CHIEF COMMISSIONER.—If the instruction was verbal, or if it was a custom of trade, it may be competent to prove it in this manner; but if it was entered in the

ship's articles, then they ought to be produced. The receipt must necessarily have been in writing, and therefore the parol statement as to it is not evidence.

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The witness was afterwards asked if he had lately found an account current between Captain Blackburn and the pursuer.

A document rejected, not having been produced eight days before a trial.

Clerk, for the defender.—We object to the question, and to the production. The document was not communicated to us; and the witness refused to produce the paper, or to be examined on commission as a haver.

Graham.—We wish to produce the account, to shew the quantity of ivory. We tried to produce every paper; but this was accidentally found after the examination of the witness under our commission.

The witness being examined by the Court, stated, that the document had been found about a week ago, and communicated to the agent for the pursuer.

LORD CHIEF COMMISSIONER.—If we had not an express rule of Court, I should be disposed to allow the production of the document. But the rule is laid down in the 5th section of the Act of Sederunt, 9th July 1817; and the exception to this is, when an affidavit

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is made mentioning the paper which the witness refuses to produce. There is then a discretion given, but here it does not appear from the deposition, that this document was called for, or that there was any refusal to produce it.

It might be hard to say, that when a party finds a document within the time limited by the Act of Sederunt, that he shall not be entitled to give it in evidence; and perhaps the Court, in such a case, might be disposed to relax, and hold it as a *casus omissus* in the Act of Sederunt. But to induce them to grant this relaxation, there must be perfect *bona fides* in the conduct of the party; and he ought, on the document coming to his knowledge, to communicate it to the agent for the opposite party.

In the present case, the communication not having been made, I cannot admit the document.

The declaration of a party apprehended under a *meditatio fugæ* warrant, received as evidence against him.

The pursuer had been apprehended on a *meditatio fugæ* warrant; and it was proposed to lay before the Jury, his declaration emitted at that time.

Clerk.—This declaration was got from the defender under an illegal warrant, and when

he had no one to advise with as to the competency of the questions put to him. The pursuer is not entitled to profit by his own wrong.

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FISHER.

Cockburn.—It is quite clear that, as I might prove the verbal statements made by the pursuer, so it is competent to produce his declaration when judicially examined.—1 Phillips, p. 88. shews this to be competent in England, and there is nothing peculiar on this subject in the law of Scotland.

LORD CHIEF COMMISSIONER.—If this case is to rest on the general principle, there can be no doubt on the subject. It is clear that the declarations of a party are to be received, and to go to the Jury, and that the Jury are to consider the credit due to the admission. If the admission is in common conversation, it may be so slight that little importance will attach to it; but if the admission is of a more solemn nature, then it becomes of importance, and is very material evidence.

Is then this declaration a species of proof that makes it an exception from the general rule? It is said it was obtained by a fraud upon the law. I cannot try that question without going into the nature of a *meditatio*

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fugæ warrant, which, sitting here, I have no right to do.

This declaration may have been made in such circumstances as to make it of little importance; but still, being the declaration of the party, I see nothing to take it out of the general rule.

If I could discover any thing peculiar in the law of Scotland on this subject, making it incompetent, I would reject the declaration.

The deposition of a witness examined on commission, cancelled before his examination in Court.

The first witness called for the defender had been examined on commission; and before he was examined in Court, his deposition was cancelled.

On cross-examination, the witness was asked whether in 1818 he had any conversation on the subject of this dispute with a person of the name of Johnston.

LORD CHIEF COMMISSIONER.—The witness may tell us what he said to Johnston, but cannot prove what Johnston said.

Some time after, it was suggested that this was incompetent by the law of Scotland, and ought not to be taken as evidence; to which

it was answered, that the objection came too late.

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LORD CHIEF COMMISSIONER.—I certainly did admit this on the supposition that it was competent for Mr Cuninghame to call a witness to contradict him. I am sorry if any fact has been illegally obtained; and if that has happened, it is right that it should still be withdrawn.

It was afterwards proposed to call evidence to prove the good character of the defender.

In damages for
embezzlement
of property, in-
competent to
prove the good
character of the
defender.

LORD CHIEF COMMISSIONER.—If you shew me that this is the law of Scotland, I shall admit it; but it was only two days ago that I laid down the reverse. But you are entitled, as a fact, to prove that he has been in the employment of one person ever since this transaction.

Cockburn opened the case, and stated the facts, and said—The main fact was, Whether this dilapidation—this theft, took place? and to shew that it did, he would prove that ten or eleven tons of ivory had been put on board; and that only two and a half were brought home.

Clerk, for the defender, said, this was an at-

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tempt by perjury, to swear away the character of a respectable and careful shipmaster—that no fault was found, but the books were approved of at the end of the voyage—that the pursuer had not acted with common fairness.

Cockburn—Maintained that the defender had not proved the case stated. No proof had been brought against the pursuer's witnesses; and if what they swore was false, it was a monstrous conspiracy, supported by perjury; and that the defender's evidence had made his case worse.

LORD CHIEF COMMISSIONER.—This case has now occupied many hours, and I have no doubt that you have attended to it with anxiety. This feeling must in some degree be excited by every case, but especially by one where there is contrary evidence.

Evidence of
extrajudicial
statements by
a witness,
withdrawn
from the consi-
deration of the
Jury.

In this case the only point of law is one relating to the competency of proving what a witness had previously stated to others. Soon after the institution of this Court, this question arose, and on that occasion, when I was assisted by **LORD PITMILLY**, it was decided to be incompetent, and the evidence was rejected (See Vol. I. p. 49.). If the incompe-

tency of the evidence had been suggested to me, I trust I should have had sufficient recollection to have rejected it; but now I can only express a hope that it has not made an impression on you; and as it was illegal, you ought as far as possible to exclude it from your consideration.

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v.

FISHER.



Where there is contrariety of evidence, as on the present occasion, the case is peculiarly within the province of the Jury; but I shall make such observations as may assist you in coming to a correct conclusion. The great fact relates to the ivory; and probably if the transaction at Princes Island had stood alone, the action might not have been brought. But that transaction is of importance here, where the question is as to the correctness of the witnesses; for if you find them incorrect as to that transaction, you will naturally carry this forward, and presume them incorrect as to the other; but if you find them correct as to the first transaction, you will presume them also correct as to what took place at Barbadoes.

At Princes Island two casks were sent on shore, but the contents are not proved, and there is no reason to presume that the goods sent in return were not of equal value. If the master took dollars, that was trading; but the witness only saw something in a handker-

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FISHER.



chief, which appeared of the size and shape of coin.

With respect to the ivory, Blackburn's letter states that there were 3000 lbs. on board, but he does not say it was his complement; and a witness swears that a large canoe came afterwards. In considering the evidence with regard to what took place at Barbadoes, you will attend to the circumstance, that if the statement is false, it must combine conspiracy and perjury, but if true, that the transaction is stated to have taken place during the day, and in sight of the crews of both vessels.

His Lordship then stated the different circumstances from which the Jury must judge as to the probability of the truth of the testimony. And having read an answer by the master of the vessel into which the ivory was said to have been carried at Barbadoes, to an interrogatory under a commission, his Lordship observed, that either he or the witnesses for the pursuer must be perjured, as they were directly opposed.

Verdict—" For the pursuer, damages
" L.1767."

Cockburn and James Graham, for the Pursuer.

Clerk and Cuninghame, for the Defender.

Cunningham moved for a rule to shew cause why there should not be a new trial; on the ground, 1st, of the verdict being contrary to evidence; 2^d, of misdirection; incompetent evidence having been admitted, and competent evidence rejected; the Jury being allowed to take into consideration the parol proof, when it was established that there was written evidence (the trade-book, which comes in place of the bill of lading), which ought to have been produced.—Stair, B. iv. T. 42, §. 1, 2, p. 708, 709, and 715.

LORD CHIEF COMMISSIONER.—The log-book was not produced. This objection was not stated at the trial; but as you did state generally the insufficiency of the evidence, you may hold it as taken then. It was proved that this book was not to be found, and then proof was given of the facts; and we must be very cautious in a matter of this kind, as all cases would be better tried after the defects have been discovered at a first trial.

Cunningham.—We also plead *res noviter*, viz. the document offered by the pursuer at the trial.

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v.

FISHER.

1822.

January 14,
June 26, and
July 3.

A new trial granted, the ends of justice not having been served by the first trial.

KITCHEN
v.
FISHER.



LORD CHIEF COMMISSIONER.—That was not admitted, because *you* objected to it.

Cunningham.—This was an English voyage, and the statute of limitations cuts off the right of action. The parol evidence was procured in an objectionable manner, by offering a reward, and there was gross contradiction. *Fabrilus v. Cock*, 3 Burrow's Rep. 1771. The pursuer has not thrown all the light on the subject—*Norris v. Freeman*, 3 Wil. 38; *Grant on New Trials*, 188; *Swinerton v. Marquis of Stafford*, 3 Taunt. 91.

LORD CHIEF COMMISSIONER.—In the circumstances of the case, we shall grant the rule to shew cause. This case I considered one of contradictory evidence, and I took pains to shew the Jury the matters of fact and the circumstances to which they ought to direct their attention. The Jury then, as was their duty, balanced the evidence, and gave their verdict.

In England, when there is contrary evidence, and reason to suppose that there has been false swearing, the general rule is to leave it to the Jury. There are, however, exceptions to this; and in the present case, where there are many circumstances to make it possible that justice has not been done, we are of opinion that the question should

undergo further investigation. What Mr Justice Buller says, appears to me extremely applicable to this Court, viz. that nothing tends more to the due administration of justice than liberality in granting the rule to shew cause for a new trial.

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v.
FISHER.

If the parties are willing to put themselves to the expence of the discussion, I think we ought not to put ourselves in the way. We are ready to take this into consideration on the various grounds which have been stated.

Cockburn.—In this case I admit that the evidence was not perfectly consistent; but there was evidence on both sides, which must support the verdict. He then went through the evidence in detail, and on each of the points taken by Mr Cuninghame, stated reasons why a new trial should not be granted.

June 26.

Clerk.—Maintained and enforced the grounds taken by Mr Cuninghame, and stated, that though the witnesses swore to quantities, their oaths were in opposition to figures, which could not lie; and that if the trade-book had been produced, it would have proved how the outward cargo was disposed of; and that there were not the means of procuring the quantity of ivory said to be on board.

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v.
FISHER.

PRESENT,
THE THREE LORDS COMMISSIONERS.

July 3.

LORD CHIEF COMMISSIONER.—There have been few cases, here, which have occasioned more thought, or which I have oftener turned in my mind, than the present.

It is admitted that the Jury have not found damages on account of the quantity said to have been put on shore at Princes Island, or into the boat on the coast of Ireland. The case is therefore now reduced to the second transaction. But though it is limited to the transaction at Barbadoes, the Court cannot throw the other evidence out of its consideration.

This case is singularly situated in its facts, and in some other circumstances connected with it; and I never have met with one resembling it in the course of my experience. The case is not proceeded in till 1816, ten years after the facts occur, and the summons not executed till 1817. The pursuer says this was owing to the absence of the sailors, who swore that they did not make the communication till 1816, and that they had no opportunity of making it sooner. They were,

however, at Liverpool in 1808, though it does not appear whether they were there at the same time.

KITCHEN
v.
FISHER.



The cargo which arrived was landed at Liverpool—a settlement takes place—Clare, who acts on the part of the pursuer, is dead before the action is brought—the action is not brought in England, where both are resident, where the witnesses are better known, and where there was better means of sifting the truth of their testimony; and only three are brought out of at least twenty connected with the ship—a settlement is made on the arrival of the ship, and L.100 is paid to the defender, as a remuneration for his success in the voyage.

What is the inference from this as to the defender? Is it not that the cargo was accounted for, and compared with the manifest, and that Clare was satisfied that the outward cargo was fairly accounted for? I do not state this as shewing that the witnesses were incorrect in stating the quantities sent out of the vessel, for this would be improper, where the case may again be solemnly tried; but to shew that there is matter to lead the Court to consider whether this was sufficiently proved. Three witnesses were called to prove it—

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they are not supported by the circumstances, and they are opposed by parol evidence on the other side. The pursuer too is called as a haver, and refuses to be examined, which was incorrect. But the difficulty is, that there was such negligence on the part of the defender, that we can scarcely grant this on surprise. I would, therefore, rather ground it on the great fundamental principle, that there may be doubt how far justice has been done in the case, than on any distinct ground.

To make out the case, it must be proved that the quantity of ivory was on board, otherwise the witnesses must be mistaken as to it being sent out. The witnesses differ as to the manner in which it was brought on board, and the differences are not merely on small matters. It is a very singular case, and the evidence of one of the witnesses, it appears to me, must be thrown out of view.

The pursuer might have shewn that the cargo sent out was sufficient to have purchased this ivory; and if it turns out that the cargo was no more than sufficient for the ordinary business of the voyage, this will be a strong circumstance to confirm the case of the defender. Proof as to the ordinary size of a canoe, and the manner in which the

ivory might have been brought on board, is also fit for the consideration of the Jury. There must also be hundreds of persons in Liverpool qualified to prove the amount that might have been purchased with the cargo sent out, and which will either confirm or shake the testimony of the other witnesses. On the whole, it appears to me, that this case has not been sufficiently tried for the purpose of justice.

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v.
FISHER.

NEW TRIAL.

PRESENT,
THE THREE LORDS COMMISSIONERS.

On this day the new trial proceeded.*

One of the witnesses for the defender was designed as Captain R. N., in Edinburgh, which was said not to be sufficient.

1823.
July 16.

A finding for the defender on a claim for goods alleged to have been embezzled.

* *July 10th 1823.*—An application was made by the defender, for a diligence to recover writings, which was opposed on the ground that they could not then be produced eight days before the trial, of which notice had been given for the 16th. The Court at first seemed doubtful whether the diligence ought to be granted, as it would involve the party in unnecessary expence. But of consent, the diligence was granted for the recovery of writings from the party or his agent.

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LORD PITMILLY.—Unless it can be said that inquiries were made, and that the witness could not be found, I do not think the objection good. The purpose of a list is to enable the opposite party to find the witnesses; and if the designation is sufficient for this purpose, that is all which is required.

Cockburn and *Moncreiff* stated—That this was a pure question of fact, and that ivory to the value of at least L.1468 had not been accounted for; and that a former Jury, after a long trial, had given L.1767.

LORD CHIEF COMMISSIONER.—A second trial ought to proceed as the original one; and the former verdict ought not to produce any impression, though there is no objection to stating it as matter of history.

Murray, for the defender, stated—The improbability, or almost impossibility, of the truth of the story told by the pursuer's witnesses; and that he would prove that the ivory never was on board.

LORD CHIEF COMMISSIONER.—There is no case more fit for a Jury than the present, as it is necessary to balance the evidence; and by your intercourse with the world, you are well qualified to judge of the credit to be given to testimony.

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On the 1st Issue, the pursuer having given no proof, the verdict must be for the defender. On the 2d; as to what was done on the voyage home, there is only one witness; but I do not mean on that account to withdraw his evidence, as there are circumstances to be taken along with it.

If you are of opinion that the other evidence shews that this ivory was not sent out of the vessel, it will reduce the inquiry to what took place at Barbadoes; and upon this, the situation of the parties, and the dates, are matters of importance.

This action is not brought for six years after the date of the information, and nine years after the cause of action arose.

When a pursuer delays so long to bring his action, he must be prepared to make out a clear case, as the mere delay affords a presumption against him; and the defender cannot be so well prepared to meet him. You will also consider the evidence of the persons who were on board the vessels, and who did not see the ivory; for though this is negative testimony, if sending out the ivory is a fact which they must have seen had it occurred, their testimony amounts to positive evidence. You must also judge of the truth of the testi-

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mony of the master of the vessel, on board of which the ivory was said to have been sent ; for if you believe him, it appears to me to put an end to the case ; or if you think there is not clear credible evidence that it was put on board, then you cannot hold it to have been embezzled.

Verdict—" For the defender on all the
" Issues."

Moncreiff and *Cockburn* for the Pursuer.

J. A. Murray, Skene, and Cuninghame, for the Defender.

(Agents, *Thomas Grahame, W. S.* and *Alexander Fairley.*)

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ERRATA.

Page 133, line 11, *for a read an.*

153, line 23, *insert (Agents, D. Cleghorn, W. S. and Forsyth and M'Dougal.)*

358, line 12, *for Barrow read Burrow.*

367, margin, *for CAMPBELL v. ALLAN, read ROBINSON v. EDINBURGH & LEITH SHIPPING Co.*

399, line 10, *for burgh, read burrow.*

—, line 17, *for will, read would.*

432, marginal note, *for sale, read seal.*

468, line 15, *for wrote Lord, read wrote to Lord.*

563, marginal note, *for Damages against, read Damages claimed against.*

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